Bridging Troubled Waters: Linking Corporate Efficiency and Political Legitimacy Through a Discourse Theory of the Firm

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As corporations increasingly dominate our economic, social, and political lives, and as shareholders vie for greater influence over business policies, can a new "discourse theory" of the firm guide the evolution of corporate law better than current theories primarily focused on shareholder wealth maximization? A series of related developments render the question of paramount importance to sustaining the basic efficacy of business decisions and the legitimacy of our polity as well. First, existing corporate law principles provide insufficient guidance regarding how managers should take into account the various shareholder and stakeholder interests expressed with increasing variety and intensity. Second, the impotence of corporate law to sustain minimal trust in the collection, reporting, and disclosure of social data threatens the viability of the $32 trillion market for corporate social responsibility. Third, the prevailing corporate law regime permitting corporate managers to ignore various shareholder and stakeholder interests becomes morally untenable as corporations aggressively dominate the political landscape. At the core of each of these three problems lies a fundamental failure to engage in effective discourse with the constituencies that corporations should ultimately serve. Unless legal doctrine evolves to embrace effective discourse as a guiding principle for assessing corporate decisions, the efficiency of corporate practices and the legitimacy of the polity hang in the balance.

This Article represents the second major installment in a series that advances a new "discourse theory" of the firm. Discourse theory provides a set of robust political and organizational principles to guide the evolution of corporate law doctrine in a way that provides meaningful insights regarding the proper place of shareholders and other stakeholders in affecting corporate decisions. While the first work in the series provided a skeletal introduction regarding the amenability of corporate law to discourse theory, this Article puts substantial doctrinal meat on the bones by fleshing out in detail the legal standards and organizational mechanisms for implementing a new discourse theory of the firm. The Article concludes that implementing a new discourse theory of the firm would help solve the problems infecting current corporate law, promote greater efficiency in business decisions, and ensure basic legitimacy within the political realm.

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TABLE OF CONTENTS

I. INTRODUCTION

As corporations increasingly dominate our economic, social, and political lives, and as shareholders vie for greater influence over business policies, can a new "discourse theory" of the firm guide the evolution of corporate law better than current theories primarily focused on shareholder wealth maximization? A series of related developments render the question of paramount importance to sustaining the basic efficacy of business decisions and the legitimacy of our polity as well.

First, existing corporate law principles provide insufficient guidance regarding how managers should take into account the various shareholder and stakeholder interests expressed with increasing variety and intensity. Although often perceived by corporate managers as nettlesome distractions, shareholder and stakeholder opinions now present potential avenues for significant economic growth; ignoring their concerns puts the corporation at risk for serious sanctions from investors, consumers, and the communities the corporations inhabit. As the new Securities and Exchange Commission (SEC) Chair, Mary Jo White, recently stated in a December 2013 speech at the Transatlantic Corporate Governance Dialogue:

> When shareholders have the ability to scrutinize a company's corporate governance practices, they can help to identify areas of improvement. But, this only happens if the board and management invite shareholder engagement and actively consider the interests of the shareholders they serve. Even in companies with so-called state of the art corporate governance practices, engagement with shareholders provides very valuable feedback and insights.[1]

Current corporate law doctrine predicated upon shareholder wealth maximization, however, relegates shareholders to relatively passive roles and says precious little about the degree to which corporations should heed concerns of employees, community members, and other stakeholders affected by corporate practices. Although an increasing number of corporate managers tout the need to engage shareholders and stakeholders at some level, the quality of the discourse remains dysfunctional at best. In some instances, corporations suffer attack by zealous interest groups that privilege moral positions over profit motives. As one scholar noted, "[Y]ou haven't seen shareholder activism until you see a nun battling it out with CEOs. They can be devastating."[2]

On the other side of the failed discourse, shareholders and other stakeholders often feel ignored or intimidated by corporate managers. For example, Chevron recently subpoenaed from one of its largest shareholders, Trillium Asset Management, documents related to Trillium's proxy proposals that requested the SEC to review the accuracy of the company's environmental disclosures and asked the company to designate one board seat for an environmental expert.[3] After suffering an $18 billion judgment from an Ecuador court related to environmental harms, Chevron brought a racketeering claim in the United States against a host of parties and asserted "Trillium was working closely with plaintiffs in the Ecuador case to pressure Chevron into a settlement."[4] Chevron's retaliation against Trillium received fast criticism as an inappropriate attack on the legitimate voicing of important shareholder

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[1] Mary Jo White, Chair, Sec. & Exch. Comm'n, Remarks at the 10th Annual Transatlantic Corporate Governance Dialogue (Dec. 3, 2013), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1370540434901#.UqDvRMuA2cM.

[2] Michael R. MacLeod, *Emerging Investor Networks and the Construction of Corporate Social Responsibility*, 34 J. CORP. CITIZENSHIP 69, 81 (2009) (citations omitted).

[3] Gretchen Morgenson, *Chevron Aims at an Activist Shareholder*, N.Y. TIMES, Dec. 8, 2012, http://www.nytimes.com/2012/12/09/business/chevron-takes-aim-at-an-activist-shareholder.html.

[4] *Id.*

concerns.[5] But even in the absence of acrimony, a happy yet hapless discourse among corporate managers, shareholders, and stakeholders does not clearly result in improved corporate practices or greater profits. As a result, existing corporate discourse often imposes significant costs without garnering clear mutual gains.

Second, the impotence of corporate law to sustain minimal integrity and trust in the collection, reporting, and disclosure of social data threatens the viability of the $32 trillion market for corporate social responsibility (CSR).[6] With snowballing celerity, consumers and investors take into account a variety of social, environmental, and ethical criteria before purchasing a company's products or stock.[7] In an efficient market, consumers and investors should reward companies that comply with CSR preferences by paying a premium in stock or product price. To the extent that premium exceeds the cost of compliance, corporations gain along with CSR-focused consumers and investors.[8] If a Pareto improvement results where all parties enjoy greater welfare, the market for morality creates new economic wealth. Current corporate law, however, permits corporations to engage in a kind of strategic ambiguity in their public disclosures that enables pilfering a CSR premium without actually embracing CSR practices.[9] If consumers and investors cannot trust the integrity of corporate communications, a corporate version of a classic Prisoner's Dilemma results. Continual dissembling by corporations, however, cannot go undetected or unpunished by the market. After recognizing a systemic failure in transparency regarding CSR data, rational shareholders and consumers will stop paying ostensibly socially responsible companies a premium in stock or product price.[10] Even though corporations, shareholders, and stakeholders could realize a win-win exchange through the market for social responsibility, current corporate law provides incentives for defective behavior that spoils potential gains for any interested party. Absent new corporate law principles that ensure higher quality collection, reporting, and disclosure of CSR data through enhanced discourse, the market for socially responsible behavior will eventually collapse.

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[5] *Id.* (reporting that Chevron's "actions against a shareholder are nonetheless remarkable" and quoting an investment firm executive who stated, "A shareholder making a legitimate appeal to the company doesn't deserve this kind of counterattack").

[6] PRINCIPLES FOR RESPONSIBLE INV., ANNUAL REPORT 2012, at 2 (2012), *available at* http://d2m27378y09r06.cloudfront.net/viewer/?file=wp-content/uploads/Annualreport2012 1.pdf (reporting that as of May 2012, owners and managers of assets valued at more than $32 trillion signed the United Nations Principles for Responsible Investment, an international compact whereby signatories pledged to screen investments based on certain environmental, social, and governance issues).

[7] *See id.*

[8] *See infra* Part II.B.

[9] *See infra* note 49 and accompanying text.

[10] *See infra* notes 23–31 and accompanying text.

Third, the prevailing corporate law regime permitting corporate managers to ignore various shareholder and stakeholder interests becomes morally untenable as corporations aggressively dominate the political landscape. The recent Supreme Court decision in *Citizens United v. FEC*,[11] which gives corporations essentially the same political speech rights as humans, invites corporations to dictate even further the political process. Although corporations remain distinct from sovereign nations, as corporations occupy territory previously allocated to government and control the political agenda, the legitimacy of the polity remains inextricably tethered to the legitimacy of corporate decision-making. Within existing current corporate doctrine predicated upon shareholder wealth maximization, however, no processes for robust and transparent democratic deliberation exist that would provide the necessary sense of legitimacy in either setting to thrive.

At the core of each of these three problems lies a fundamental failure to engage in effective discourse with the constituencies that corporations should ultimately serve. Unless legal doctrine evolves to embrace effective discourse as a guiding principle for assessing corporate decisions, the efficiency of corporate practices and the legitimacy of the polity hang in the balance.

This Article represents the second major installment in a series advancing a new "discourse theory" of the firm that would promote both economic efficiency and political legitimacy. The first article in the series, *A New Discourse Theory of the Firm After* Citizens United,[12] identified the basic need for a new discourse theory of the firm through exploring a "tectonic shift"[13] in the evolution of the corporation from a simple investment vehicle for generating wealth to an institution that plays a dominant role in almost every aspect of our collective lives. Inspired by the decision in *Citizens United* and the controversial (and later invalidated) SEC Rule 14a-11,[14] which gave certain shareholders the right to nominate a dissident slate of directors using the corporation's own proxy statement, the article attempted to provide a more descriptively accurate account of the influence shareholders and stakeholders possess over corporate governance. The growth of corporate power involved a concomitant clamoring by shareholders and other activists for a greater say in corporate decision-making.[15] But controlling corporate law doctrines continue to ignore the changing nature of the firm and the actual role shareholders and stakeholders play in shaping corporate behavior. Establishing what role shareholders and stakeholders *should* play still presents a highly contested question without a nuanced corporate law theory to provide a coherent answer.

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[11] 558 U.S. 310, 319 (2010).

[12] Michael R. Siebecker, *A New Discourse Theory of the Firm After* Citizens United, 79 GEO. WASH. L. REV. 161 (2010).

[13] *Id.* at 162–63.

[14] Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,782–87 (Sept. 16, 2010) (codified at 17 C.F.R. pt. 240), *invalidated by* Bus. Roundtable v. SEC, 647 F.3d 1144, 1156 (D.C. Cir. 2011).

[15] *See* Siebecker, *supra* note 12, at 179–89.

Discourse theory, however, provides a set of robust political and organizational principles to guide the evolution of corporate law doctrine in a way that provides meaningful insights regarding the proper place of shareholders and other stakeholders in affecting corporate decisions. The first article in the series laid out the basic philosophical blueprint for employing discourse theory within a corporate law construct.[16] Building upon the collected works of political philosopher Jürgen Habermas, the article suggested that the legitimacy of corporate decisions should not depend on whether they maximize shareholder wealth but instead on whether they emerge from full and fair discussion among the constituencies that corporations serve.[17] Grounded in the notion that robust discourse enhances the effectiveness and justness of the organizational structures that affect our lives, a discourse theory of the firm requires crafting rules and incentives that promote independent expression of opinions, equal participation by affected parties in deliberative processes, respectful consideration of viewpoints, and the ability to alter past decisions through continued discourse.[18] The article concluded that affording shareholders a right to nominate a dissident slate of directors on the corporate proxy statement would provide a necessary initial step to ensure continual engagement between corporate managers and the constituencies they serve.[19] Thus, implementing discourse theory within existing corporate law would better enable corporate managers to align business practices with evolving market preferences.

While the first work in the series simply provided a skeletal introduction regarding the amenability of corporate law to discourse theory, this Article puts substantial doctrinal meat on the bones by fleshing out in detail the legal standards and organizational mechanisms for implementing a new discourse theory of the firm. To accomplish that goal, Part II identifies the interconnected problems that plague existing corporate law jurisprudence and spur a need for a fresh organizational construct centered on reflective discourse. Based on the recognition that inadequate communication lies at the core of each of the problems described, Part III explicates how the basic tenets of a new discourse theory of the firm might solve those potentially disastrous communication shortcomings. Part IV describes the legal standards through which courts, legislatures, administrative agencies, and non-governmental organizations could incentivize and enforce a more robust discourse within corporate decision-making and disclosure. Part V then surveys a variety of organizational methods and practices for discourse that corporations could adopt to satisfy the legal standards proposed. With a critical eye, Part VI explores some implications of adopting a new discourse theory. The Article concludes that implementing a new discourse theory of the firm would help solve the problems infecting

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[16] *Id.* at 198–208.
[17] *Id.* at 185.
[18] *Id.* at 199–200.
[19] *Id.* at 225–30.

current corporate law, promote greater efficiency in business decisions, and ensure a basic legitimacy within the political realm.

II. THE TROUBLED WATERS OF CORPORATE LAW

A confluence of interconnected problems drives the need for a new discourse theory of the firm. First, the quickly growing influence of activist shareholders, stakeholders, and interest groups provides a special impetus for corporations to attend to those voices in a manner that benefits, rather than harms, the firm. Current corporate law doctrine, however, provides insufficient guidance regarding how to harmonize the cacophony of those often discordant voices, with corporations left foundering regarding which interests to heed or to eschew. Second, the impotence of corporate law to secure a sense of trust in the collection, reporting, and disclosure of social data threatens the collapse of the $32 trillion market for CSR. Third, as corporations occupy an increasingly dominant role in all aspects of social, political, and economic life, corporate law doctrine must secure a more robust sense of legitimacy in corporate decision-making. But in light of the ongoing spate of corporate scandals reflecting a pathological privileging of managerial interests above the common good and with *Citizens United* enticing corporations to dominate even further the political realm, the prevailing corporate law regime that allows, if not encourages, corporate managers to ignore shareholder and stakeholder interests becomes morally untenable. In essence, the very legitimacy of our political system now remains inextricably tied to the legitimacy of corporate decisions and practices. A corporate law regime predicated simply upon the maximization of shareholder wealth adulterates rather than promotes the bedrock sense of legitimacy necessary for our democratic values to sustain.

A. *A Cacophony of Corporate Voices*

Despite the growing activism and influence of shareholders, stakeholders, and other interest groups regarding corporate practices, existing corporate law doctrines provide little guidance regarding which viewpoints corporations should heed or perhaps ignore.[20] Regardless of the lack of meaningful guidance in the law, many market professionals and academics suggest that corporations

[20] *See* MacLeod, *supra* note 2, at 79 (arguing the recent growth of institutional investors led to "a sharp rise in investor (or shareholder/shareowner) activism (or engagement), which covers a broad spectrum of investor activities including selling shares, private discussion or public communication with corporate boards and management, press and other public campaigns, openly talking and/or organising with other shareholders, putting forward shareholder resolutions, [and] calling shareholder meetings"); Edward B. Rock, *Shareholder Eugenics in the Public Corporation*, 97 CORNELL L. REV. 849, 851–53 (2012) (describing a new "era of empowered shareholders"); Siebecker, *supra* note 12, at 179–89 (discussing the evolution of shareholder activism and the legal status of shareholders in affecting corporate policies).

should take better account of shareholder and stakeholder concerns. Although debate continues about whether acquiescing to shareholder preferences produces economic gains, Professor Ed Rock suggests that:

> We live in an era of empowered shareholders. . . . That new reality requires rethinking the relationship between shareholders and the firm. Learning how to interact productively has never been more important to shareholders or firms. From a regulatory perspective, we need to reconsider some current limitations that treat shareholders like children.[21]

The corporate world may indeed find itself in a new era of shareholder and stakeholder activism, but corporations differ markedly in their approaches to considering those increasingly ardent opinions.[22]

For some corporations, shareholder and stakeholder activism provides opportunities for corporations to gauge more effectively consumer and investor preferences in a manner that generates economic growth. For example, Smithfield Foods runs the largest pork production and processing operation in the world.[23] The Humane Society publicly criticized Smithfield for raising its pigs in unethical conditions and ultimately filed suit against the company in 2011.[24] The Humane Society asserted that Smithfield later changed its husbandry practices as a direct response to the Humane Society campaign.[25] Smithfield now emphasizes in its *2012 Integrated Report* that implementing more humane animal management systems "benefits our pigs and also our company's overall financial health" through positive effects in reputation, relationships with consumers, and production levels.[26] Though simply

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[21] Rock, *supra* note 20, at 853.

[22] *See* White, *supra* note 1 (acknowledging that corporate managers and shareholder interest groups may disagree about the proper shape shareholder engagement should take).

[23] Smithfield's website claims: "Today we are a $13 billion global food company and the world's largest pork processor and hog producer." *Corporate Information*, SMITHFIELD FOODS, http://investors.smithfieldfoods.com/overview.cfm (last visited Jan. 5, 2014); *see also* David Barboza, *Goliath of the Hog World; Fast Rise of Smithfield Foods Makes Regulators Wary*, N.Y. TIMES, Apr. 7, 2000, http://www.nytimes.com/2000/04/07/business/goliath-of-the-hog-world-fast-rise-of-smithfield-foods-makes-regulators-wary.html?pagewanted=all&src=pm.

[24] Dina Spector, *11 Amazing Facts About the McDonald's McRib*, BUS. INSIDER (Dec. 17, 2012, 10:26 AM), http://www.businessinsider.com/amazing-facts-about-the-mcdonalds-mcrib-2012-12?op=1.

[25] Greg Hack, *Seaboard Foods Changes Language on Animal Treatment*, KAN. CITY STAR (Feb. 13, 2013), http://www.kansascity.com/2013/02/13/4064146/seaboard-changes-language-on-animal.html ("In response to its campaigns, the Humane Society said, other producers such as Smithfield Foods, Cargill and Hormel Foods 'have begun moving away from gestation crates'. . . . ").

[26] *See* SMITHFIELD FOODS INC., 2012 INTEGRATED REPORT, at 21 (2012), *available at* http://files.shareholder.com/downloads/SFD/2747261510x0x590240/F33D665C-409C-4825-A50E-D7F90C10F399/smi_integrated_12.pdf.

anecdotal, Smithfield provides one example of potentially effective discourse between the corporation and the constituencies it affects.

Moreover, recent empirical studies demonstrate that the market places a positive value on shareholder access[27] and that equity analysts take into account the quality of communication between managers and corporate stakeholders in assessing stock value.[28] Even absent proof positive that shareholder activism enhances shareholder value, the reputational and branding benefits to stakeholder engagement come at a very little cost and arguably justify the minor nettlesome distraction that stakeholder dialogue might produce.[29] Many companies recognize that heeding at least some interest group concerns can produce positive changes in corporate practices that promote long-term value for the corporation.[30] Moving beyond mere short-term shareholder wealth maximization, increased activism by shareholders may cause a shift toward "enlightened shareholder value"[31] that takes into account non-monetary concerns upon which shareholders make actual investment decisions. Thus, for many corporations, fostering economic success for the corporation over a longer time horizon remains compatible with—if not dependent upon—meaningful shareholder and stakeholder dialogue.

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[27] Bo Becker et al., *Does Shareholder Proxy Access Improve Firm Value? Evidence from the Business Roundtable Challenge*, 56 J.L. & ECON. 127, 157 (2013).

[28] Christian Hoffmann & Christian Fieseler, *Investor Relations Beyond Financials: Non-financial Factors and Capital Market Image Building*, 17 CORP. COMMS.: INT'L J. 138, 146–47 (2012) (providing empirical evidence that equity analysts take into account the quality of corporate communications with shareholders, corporate governance policies, socially responsible practices, and image building when assessing the value of a company's stock).

[29] D. A. Jeremy Telman, *Is the Quest for Corporate Responsibility a Wild Goose Chase? The Story of* Lovenheim v. Iroquois Brands, Ltd., 44 AKRON L. REV. 479, 483–84 (2011) ("Corporations seem to recognize the value of permitting social proposals, as they can provide a relatively inexpensive safety valve for dissent and thus permit the kind of beneficial exchange between management and shareholders that promotes the legitimacy of the corporate decisionmaking processes." (footnote omitted)).

[30] *See, e.g.*, MALCOLM MCINTOSH & RUTH THOMAS, BRITISH–N. AM. COMM., CORPORATE CITIZENSHIP AND THE EVOLVING RELATIONSHIP BETWEEN NON-GOVERNMENTAL ORGANISATIONS AND CORPORATIONS 42–43 (2002), *available at* http://www.cdhowe.org/pdf/bnac_45.pdf (asserting that, with respect to stakeholder challenges at Shell, "These critical incidents brought into focus ongoing difficulties and convinced senior-level employees that the company needed to engage more openly with its stakeholders. A series of high-level negotiations with a range of leading NGOs ensued, illustrating the emerging role of NGOs as contributors to strategic, long-term change in organisations." (footnote omitted)); GEORGE POHLE & JEFF HITTNER, IBM GLOBAL BUS. SERVS., ATTAINING SUSTAINABLE GROWTH THROUGH CORPORATE SOCIAL RESPONSIBILITY 1 (2008), *available at* http://www-935.ibm.com/services/us/gbs/bus/pdf/gbe03019-usen-02.pdf.

[31] Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder–Stakeholder Divide*, 36 J. CORP. L. 59, 95–111 (2010) (arguing for a new metric of enlightened shareholder value to measure the efficacy of management decisions).

On the opposite side of the spectrum, however, a different set of market professionals and scholars suggest that shareholder and stakeholder activism simply distracts corporate managers and ultimately diminishes shareholder value. For instance, when Greenlight Capital hedge fund manager, David Einhorn, recently won a battle to have a shareholder proposal placed on the Apple corporate proxy that would prevent the company from limiting certain stock options, Apple CEO Tim Cook publicly excoriated Einhorn for creating a "silly sideshow . . . . This is a waste of shareholder money and a distraction, and not a seminal issue for Apple."[32] What concerns Cook and other vocal opponents[33] is the capture of management by special interest groups who do not possess the company's long-term interests at heart.[34] Managers fear shareholders remain essentially uninformed about the effects of various propositions on business performance and misuse the proxy access process for purely personal gain.[35] As a result, some corporations adopt a staunchly adversarial posture towards stakeholder or shareholder engagement, as the prior example of Chevron suing one of its largest shareholders illustrates.[36]

[32] Poornima Gupta & Edwin Chan, *Apple CEO Calls Einhorn Lawsuit "Silly Sideshow,"* WASH. POST, Feb. 12, 2013, http://www.washingtonpost.com/business/economy/apple-ceo-calls-einhorn-lawsuit-silly-sideshow/2013/02/12/0029608c-755e-11e2-aa12-e6cf1d31106b_story.html.

[33] *See* Martin Lipton, *Bite the Apple; Poison the Apple; Paralyze the Company; Wreck the Economy*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 26, 2013, 9:22 AM), https://blogs.law.harvard.edu/corpgov/2013/02/26/bite-the-apple-poison-the-apple-paralyze-the-company-wreck-the-economy/ (In criticizing Einhorn's attack on Apple, Lipton stated, "These self-seeking activists are aided and abetted by Harvard Law School Professor Lucian Bebchuk who leads a cohort of academics who have embraced the concept of 'shareholder democracy' and close their eyes to the real-word effect of shareholder power, harnessed to activists seeking quick profit, on a targeted company and the company's employees and other stakeholders. They ignore the fact that it is the stakeholders and investors with a long-term perspective who are the true beneficiaries of most of the funds managed by institutional investors.").

[34] *See* Pablo Archel et al., *The Institutionalisation of Unaccountability: Loading the Dice of Corporate Social Responsibility Discourse*, 36 ACCT. ORG. & SOC'Y 327, 328 (2011) (positing that existing modes of stakeholder discourse privilege certain dominant viewpoints); JAMES R. COPLAND, MANHATTAN INST., PROXY MONITOR 2011: A REPORT ON CORPORATE GOVERNANCE AND SHAREHOLDER ACTIVISM 3, 19 (2011), *available at* www.proxymonitor.org/Reports/Proxy_Monitor_2011.pdf (suggesting that shareholder activism provides for "interest-group capture of corporations rather than for mitigating agency costs and improving shareholder returns"); Andrew Ross Sorkin, *"Shareholder Democracy" Can Mask Abuses*, N.Y. TIMES (Feb. 25, 2013, 9:30 PM), http://dealbook.nytimes.com/2013/02/25/shareholder-democracy-can-mask-abuses/ (identifying "a perverse game in which so-called activist investors take to the media to pump or dump stocks in hopes of creating a fleeting rise or fall in a company's stock price").

[35] Stephen M. Bainbridge, Response, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1751 (2006); Bernard S. Sharfman, *Why Proxy Access Is Harmful to Corporate Governance*, 37 J. CORP. L. 387, 405–06 (2012).

[36] *See supra* notes 3–5 and accompanying text.

Between absolute antipathy toward stakeholder engagement and effective dialogue lies an ambiguous middle ground where companies, managers, and scholars remain uncertain about the ultimate gains derived from shareholder and stakeholder participation in corporate decision-making.[37] The uncertainty results from a lack of clear incentives provided to shareholders and managers to engage in robust discourse that could lead to a mutually beneficial outcome.[38] For most shareholders, it is simply not cost effective in the current regulatory regime to challenge management over business practices, with only the most strident interest groups vigilant enough to battle for arguably non-quantifiable moral gains.[39] Occupying this middle ground does not necessarily reflect a rebuke to corporations that engage in discourse with stakeholder groups. Instead, the middle position entails skepticism about the effectiveness of discourse among corporate managers, shareholders, and stakeholders.[40] Perhaps as a result of *Citizens United* greatly increasing the ability of companies to affect aggregate political preferences[41] or due to the malleability of shareholder interests,[42] dialogue between companies and shareholders may not actually produce win-win gains for both sides.[43]

B. *The Moribund Market for Morality*

The glaring inability of corporate law to maintain sufficient integrity in the collection, reporting, and disclosure of social data portends the collapse of the

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[37] For a thorough yet early examination of this viewpoint with regard to institutional investors, see generally Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445 (1991).

[38] Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1275 (2008) (arguing that shareholders are rationally apathetic regarding corporate affairs and that proxy rules effectively prohibit shareholders from soliciting proxy votes in director voting); Tom C.W. Lin, Essay, *The Corporate Governance of Iconic Executives*, 87 NOTRE DAME L. REV. 351, 366–68 (2011) (suggesting that investors lack incentives to engage in informed activism and, as a result, corporate managers possess little interest in heeding existing activist claims).

[39] *See* Anabtawi & Stout, *supra* note 38, at 1275. *But see* White, *supra* note 1 (stating that at least with respect to placing a shareholder proposal on the corporate proxy, "[u]nder the SEC's proxy rules, a shareholder with a relatively small investment in a company's securities has the opportunity to have his or her proposal included in the proxy materials for an annual meeting right beside management's proposals").

[40] Ho, *supra* note 31, at 64–65 (suggesting that early academic optimism regarding shareholder engagement devolved into pessimism "in the face of considerable evidence of institutional investor passivity, short-termism, complex and indeed, conflicting interests, and the limited impact of investor activism on corporate behavior").

[41] *See infra* Part II.C.

[42] Archel et al., *supra* note 34, at 340.

[43] Pieter van Beurden & Tobias Gössling, *The Worth of Values—A Literature Review on the Relation Between Corporate Social and Financial Performance*, 82 J. BUS. ETHICS 407, 416–17 (2008) (surveying studies that demonstrate neutral or negative relationships between social discourse, corporate social responsibility, and financial performance).

CSR market for morality. Even as the world economy suffers, consumers and investors increasingly take into account a variety of social, environmental, and ethical considerations in deciding whether to purchase a company's products or stock. As of May 2012, worldwide owners and managers of assets valued at more than $32 trillion signed the United Nations Principles for Responsible Investment, an international compact whereby signatories pledged to screen investments based on certain environmental, social, and governance issues.[44] That $32 trillion value represents an increase of nearly 50% over just the prior two years.[45] In the United States, as of 2012 more than $3.7 trillion gets invested based on one or more socially responsible investing strategies, marking a 22% increase since 2009.[46]

In an efficient market, companies that comply with socially responsible business practices should receive a premium in stock or product prices from CSR consumers and investors. Although professional and academic debates flourish regarding the value of such a CSR premium,[47] substantial evidence suggests a business case for CSR exists.[48] As long as the cost of compliance

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[44] PRINCIPLES FOR RESPONSIBLE INV., *supra* note 6, at 2.

[45] *See* PRINCIPLES FOR RESPONSIBLE INV., ANNUAL REPORT 2010, at 4 (2010) (reporting around $22 trillion in 2010); *see also* E. James M. Gifford, *Effective Shareholder Engagement: The Factors that Contribute to Shareholder Salience*, 92 J. BUS. ETHICS 79, 79 (Supp. 1 2010).

[46] U.S. SIF FOUND., REPORT ON SUSTAINABLE AND RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES 2012, at 11 (2012), *available at* http://www.ussif.org/files/Publications/12_Trends_Exec_Summary.pdf; GLOBAL SUSTAINABLE INV. ALLIANCE, 2012 GLOBAL SUSTAINABLE INVESTMENT REVIEW 2 (2013), *available at* http://gsiareview2012.gsi-alliance.org/#/1/.

[47] Michael R. Siebecker, *Trust & Transparency: Promoting Efficient Corporate Disclosure Through Fiduciary-Based Discourse*, 87 WASH. U. L. REV. 115, 125–26 (2009).

[48] For evidence of a "business case" for CSR that justifies corporate compliance with consumer and investor preferences, see Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855, 860–64 (2011); *see also* Archie B. Carroll & Kareem M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, 12 INT'L J. MGMT. REVIEWS 85, 95–102 (2010); Marya N. Cotten & Gail A. Lasprogata, *Corporate Citizenship & Creative Collaboration: Best Practices for Cross-sector Partnerships*, 18 J.L. BUS. & ETHICS 9, 13 n.22 (2012); Heather R. Dixon-Fowler et al., *Beyond "Does It Pay To Be Green?" A Meta-analysis of Moderators of the CEP–CFP Relationship*, 112 J. BUS. ETHICS 353, 362 (2013); Neil Gunningham, *Corporate Environmental Responsibility: Law and the Limits of Voluntarism*, *in* THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 476, 498 (Doreen McBarnet et al. eds., 2007); Satish Kumar & Ritesh Tiwari, *Corporate Social Responsibility: Insights into Contemporary Research*, 10 IUP J. CORP. GOVERNANCE, Jan. 2011, at 22, 29 ("Although there are varied views of different researchers as far as the CSR is concerned, the available literature till date suggests a positive relationship between the corporate social and financial performance . . . [A] majority of the studies indicate a positive relationship between these two."); Alison Mackey et al., *Corporate Social Responsibility and Firm Performance: Investor Preferences and Corporate Strategies*, 32 ACAD. MGMT. REV. 817, 830–33 (2007); Michael E. Porter & Mark R. Kramer, *Strategy & Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS.

does not exceed the CSR premium, corporations realize economic gains by satisfying the market preferences of CSR-focused consumers and investors. A properly functioning market in morality should thus produce a Pareto improvement where all parties enjoy greater welfare.

Current corporate law, however, permits corporations to engage in a kind of "strategic ambiguity" in social data reporting in order to garner the CSR-compliance premium without actually embracing socially responsible practices.[49] Persistent definitional ambiguity regarding what constitutes CSR, a lack of clear standards for reporting CSR data, corporate "data dumping" of voluminous irrelevant information, corporate failures to divulge appropriate data, and corporate "greenwashing" to promote a false image of social responsibility all contribute to make investors and consumers skeptical about the ability to monitor whether corporations actually uphold their end of the bargain in embracing CSR practices.[50] After *Citizens United*, corporations face increased incentives to engage in an artful alchemy of mixing otherwise commercial disclosures with sufficient political content to create an amalgam of politically tinged corporate speech wholly immune from regulation or liability.[51] If corporations enjoy success in manipulating the defects in existing corporate speech jurisprudence, adherence to that flawed framework threatens the viability of some of the most socially important regulatory regimes that target corporate communication (e.g., the securities regulation regime, federal communications law, federal food and drug regulation, state and federal antifraud laws, employment law, and workplace safety regulations, to name just a few).[52] Because corporations cannot repeatedly dissemble over the long run

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REV., Dec. 2006, at 78, 83; van Beurden & Gössling, *supra* note 43, at 413–16. For contrary evidence of the absence of a substantial link between financial performance and CSR, see Roberto Garcia-Castro et al., *Does Social Performance Really Lead to Financial Performance? Accounting for Endogeneity*, 92 J. BUS. ETHICS 107, 121 (2010); Philipp Schreck, *Reviewing the Business Case for Corporate Social Responsibility: New Evidence and Analysis*, 103 J. BUS. ETHICS 167, 183 (2011).

[49] The term "strategic ambiguity" refers to the practice of corporations to communicate "in ways that may not be completely open" in order to protect corporate interests. Eric M. Eisenberg & Marsha G. Witten, *Reconsidering Openness in Organizational Communication*, 12 ACAD. MGMT. REV. 418, 418 (1987); *see also* Eric M. Eisenberg, *Ambiguity as Strategy in Organizational Communication*, 51 COMM. MONOGRAPHS 227, 228–30 (1984).

[50] Siebecker, *supra* note 47, at 128–34.

[51] For a discussion of the incoherence in the Supreme Court's corporate speech jurisprudence and the need for a "new institutional" approach to corporate speech rights, see generally Michael R. Siebecker, *Building a "New Institutional" Approach to Corporate Speech*, 59 ALA. L. REV. 247 (2008) [hereinafter Siebecker, *Building a New Institutional Approach*]; Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613 (2006) [hereinafter Siebecker, *Corporate Speech*].

[52] *See* Jacob Bunge, *Goldstein Presses Free Speech Argument; Others Uncertain*, HEDGEWORLD DAILY NEWS, Feb. 22, 2007, *available at* 2007 WLNR 3505612 (describing a hedge fund manager's claim that certain investor solicitation rules under the securities laws unconstitutionally implicate political speech rights); Siebecker, *Corporate Speech*, *supra*

without detection, shareholders and consumers will fail to pay seemingly CSR-compliant companies a premium in stock or product price to the extent they cannot trust the integrity of the CSR-disclosure regime.[53] As a result, the $32 trillion market for morality will eventually crumble.

New corporate law principles predicated upon robust discourse rather than shareholder wealth maximization could spur a robust discourse regarding the collection, reporting, and disclosure of CSR data. That discourse could inspire the necessary sense of trust and integrity in corporate disclosures to sustain the CSR market, as consumer and investor preferences for socially responsible business practices continually evolve.

C. *Monopolizing Politics*

As corporations exercise increasing influence over the political realm following the Supreme Court's decision in *Citizens United*, existing corporate law doctrine that permits corporations to ignore various shareholder and stakeholder interests puts in jeopardy a bedrock sense of legitimacy necessary for the polity to thrive.

Corporations already occupy a dominant position in our economic and social lives. On a worldwide scale, the market capitalization of public companies well exceeds $50 trillion.[54] In comparison to sovereign nations, U.S. corporations represent a majority of the hundred largest global economies, with independent countries relegated to the lower rungs.[55] The sheer mass of wealth corporations possess makes them exceedingly powerful. But in an effort to promote or sustain their economic might, corporations play a significant role in shaping social mores and practices as well. The increased demand for socially responsible business practices from consumers and investors causes corporations to embed themselves in communities, or at least to project an image of social responsibility, in order to garner greater profits or cheaper access to capital. A recent empirical survey of international business leaders reflects that more than one half of top corporate managers believe CSR activities give their companies a competitive advantage.[56] Despite much

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note 51, at 656–71 (discussing how granting full First Amendment protection to politically tinged commercial speech would unravel some of the most important provisions of the securities laws).

[53] Siebecker, *supra* note 47, at 134–36. For a general description of the problems associated with corporate greenwashing and its inevitable discovery over time in different contexts, see Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983, 984–88 (2011); Richard Dahl, *Green Washing: Do You Know What You're Buying?*, 118 ENVTL. HEALTH PERSP. A246, A248–50 (2010).

[54] Mark J. Perry, *World Stock Market Capitalization Closes Year at $54.6 Trillion*, AEIDEAS (Jan. 18, 2013, 3:06 PM), http://www.aei-ideas.org/2013/01/world-stock-market-capitalization-at-54-6-trillion/.

[55] Siebecker, *supra* note 12, at 171.

[56] POHLE & HITTNER, *supra* note 30, at 3.

criticism of multinational corporations for excessive influence over society,[57] corporations possess a social focus that reinforces the basic profit motive.[58] After identifying which social values foster economic growth, corporations implement external and internal business practices that develop desirable social norms and behaviors.[59]

Despite the potential discomfort caused by the control of corporations over economic and social spheres, the unchecked and increasing domination of the political realm represents the primary threat to the basic legitimacy of democratic processes. Before the decision in *Citizens United*, many multinational corporations already rivaled the power of sovereign states by employing within their vast dominion substantial rulemaking, adjudicative, and security functions.[60] The resemblance between large corporations and nations

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[57] *See, e.g.*, Rogers M. Smith, *Beyond Sovereignty and Uniformity: The Challenges for Equal Citizenship in the Twenty-First Century*, 122 HARV. L. REV. 907, 914–15 (2009).

[58] POHLE & HITTNER, *supra* note 30, at 1 ("A growing body of evidence asserts that corporations can do well by doing good. Well-known companies have already proven that they can differentiate their brands and reputations as well as their products and services if they take responsibility for the well-being of the societies and environments in which they operate. These companies are practicing Corporate Social Responsibility (CSR) in a manner that generates significant returns to their businesses."); *see also* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 280 (2008) ("Thus while [corporations] are surely economic and financial instruments, they are, as well, institutions of social and political significance. The story of the contending conceptions of the corporation reflects that fact. Indeed, it may not be an exaggeration to imagine that this story resonates with an elemental tension that our society has endured since the days of the industrial revolution.").

[59] Eric W. Orts, *War and the Business Corporation*, 35 VAND. J. TRANSNAT'L L. 549, 561–62 (2002) ("[T]he nature of modern war highlights the fact that business corporations are not only abstract economic entities but social institutions. As organized institutions composed of human beings, they have moral and political as well as economic responsibilities. Like states, business corporations must therefore develop their own foreign and domestic policies, either implicitly and unconsciously or, much better, explicitly and with awareness. This does not mean that large, global corporations should appoint new vice presidents of war or defense, but it does require corporate leaders to take the larger global issues of war and peace seriously from a moral as well as an economic perspective. In a 'postnational' world, business corporations can no longer simply rely on nation-states to take care of problems of international security, if, indeed, they ever could delegate this responsibility entirely."); *see also* Eddie A. Jauregui, *The Citizenship Harms of Workplace Discrimination*, 40 COLUM. J.L. & SOC. PROBS. 347, 362 (2007).

[60] *See* Allison D. Garrett, *The Corporation as Sovereign*, 60 ME. L. REV. 129, 132 (2008) ("[T]he distinction between corporations and the state is blurring, not only internationally, but also domestically, as corporations act in ways that make them similar to nation-states. The nation-state is not dead, but it is evolving. A pivotal factor in this evolution is the power of the world's largest corporations. Like the vassal whose power overshadows the king's, these companies act similarly to traditional nation-states in some ways. They have tremendous economic power, establish security forces, engage in diplomatic, adjudicatory and 'legislative' activities, and influence monetary policy."); *see also* Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV.

certainly signals an evolutionary shift in the nature of the firm from its origins as a simple vehicle for generating wealth. Decisions governing some of the most important aspects of our lives now get made within the confidential confines of the boardroom rather than in the public sphere.

If the decision in *Citizens United* enables corporations to dominate public opinion or set the agenda on matters left open to public debate, the ability to control the corporation represents the ability to control political life. In an odd twist, corporations can use *Citizens United* both as a sword and a shield. They can pierce deeply into the political realm and potentially dominate political discourse while shielding themselves from liability in a variety of regulatory settings by commingling corporate communications with some minimal political content.[61] In the 2012 election cycle, corporations spent a record $2.5 billion trying to sway voters' opinions, although it remains unclear if corporate political activity positively correlates with enhanced shareholder value.[62] Regardless of whether political action actually enhances profits, the mechanisms for determining the manner in which corporations enter into the political foray remain of paramount concern. In American society, the essential legitimacy of government rests on transparent democratic processes that ensure elected officials represent the will of the governed. Although corporations remain distinct from polities, to the extent corporations encroach into territory once wholly occupied by government and to the extent the decision in *Citizens United* enables corporations to dominate even more effectively the political realm, the legitimacy of the polity remains inextricably tethered to the legitimacy of corporate decision-making. Within the current corporate law structure predicated upon shareholder wealth maximization, however, no processes for robust and transparent democratic deliberation exist.[63]

1285, 1308–09 (2003) (discussing how multinational corporations have increasingly encroached on the authority of states).

[61] As I have posited in another series of articles, embracing a new institutional approach to corporate speech would provide a coherent and rigorous framework to justify limitations on corporate speech in certain important institutional settings. *See* Siebecker, *Corporate Speech*, *supra* note 51, at 616–21; Siebecker, *Building a New Institutional Approach*, *supra* note 51, at 289–304.

[62] Eduardo Porter, *Get What You Pay For? Not Always*, N.Y. TIMES, Nov. 6, 2012, http://www.nytimes.com/2012/11/07/business/pitfalls-of-spending-on-politics.html?pagewanted=all&_r=0; *see also* Ctr. for Responsive Politics, *Business-Labor-Ideology Split in PAC & Individual Donations to Candidates, Parties Super PACs and Outside Spending Groups*, OPENSECRETS.ORG, http://www.opensecrets.org/bigpicture/blio.php?cycle=2012 (last visited Mar. 21, 2014) (reporting the highest level of business spending in biannual elections since 2000).

[63] Lucian A. Bebchuk, Essay, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 688 (2007); Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 OHIO ST. L.J. 53, 55 (2008) [hereinafter Fairfax, *Making the Corporation Safe*]; Roger Lowenstein, *A Seat at the Table*, N.Y. TIMES, http://www.nytimes.com/2009/06/07/magazine/07wwln-lede-t.html (last updated June 21, 2009) ("Only the management (or its handpicked board) chooses nominees, and it is an iron rule of American corporations that

Calling for greater democratization of the corporation represents nothing terribly odd or particularly new. Many argue that giving greater voice to shareholders and others affected by corporate decisions would ensure corporate decisions remain more accurately aligned with the interests of corporate constituencies.[64] The decision in *Citizens United* simply fuels the fire for enhancing shareholder suffrage. Some suggest the need for transparent disclosure of corporate political activities and shareholder approval, whether as a result of basic contract theory[65] or because corporate political spending represents a form of impermissible compelled political speech by shareholders.[66] Although greater democratization of the corporation represents a shared repercussion of a new discourse theory of the firm, discourse theory targets with philosophical and descriptive rigor both the foundations and mechanisms for legitimate action in a way that encompasses not only the interests of shareholders but all constituencies affected by corporate actions. Absent a corporate law framework structured upon a foundation of robust discourse, domination of the political sphere by corporations does violence to the sense of legitimacy essential to sustain our democratic values.

III. BRIDGING THE IMPASSE THROUGH CORPORATE DISCOURSE

A new "discourse theory" of the firm can help solve the systemic problems concerning the appropriate role of shareholders and other stakeholders in corporate governance, the viability of the $32 trillion market for CSR, and the basic legitimacy of corporate decision-making as corporations increasingly dominate the political realm. Existing theories of the firm predicated upon a stilted and static principle of shareholder wealth maximization neither accurately describe nor coherently shape the actual practices of modern corporations and the extant dynamic relationship between corporations, shareholders, stakeholders, and other important social institutions. In contrast, a discourse theory of the firm provides a more descriptively accurate account of modern corporations as they exist and offers a normatively superior framework for solving knotty corporate law problems.[67]

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ballots should not contain more nominees than seats. In the former U.S.S.R., this style of democracy endured for only 72 years. In American business it is timeless.").

[64] *See* STEPHEN BOTTOMLEY, THE CONSTITUTIONAL CORPORATION: RETHINKING CORPORATE GOVERNANCE 115–17 (2007); Fairfax, *Making the Corporation Safe*, *supra* note 63, at 55; Ian B. Lee, *Citizenship and the Corporation*, 34 LAW & SOC. INQUIRY 129, 149–52 (2009).

[65] Joseph F. Morrissey, *A Contractarian Critique of* Citizens United, 15 U. PA. J. CONST. L. 765, 806–30 (2013).

[66] Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in* Citizens United, 61 CASE W. RES. L. REV. 497, 499 (2011).

[67] *See* WILLIAM OUTHWAITE, HABERMAS: A CRITICAL INTRODUCTION 109, 120 (1994); R. Randall Rainey & William Rehg, *The Marketplace of Ideas, the Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas' Theory of Democracy*, 69 S. CAL. L. REV. 1923, 1957–58 (1996).

A. *Blueprints for a Discourse Theory of the Firm*

As a philosophical framework, discourse theory reveals how robust rules for deliberation can enhance the effectiveness of organizational structures and provide legitimacy to institutional decisions. Based on the collected works of political philosopher Jürgen Habermas, a new discourse theory of the firm requires corporations to adopt rules and incentives that promote autonomous expression of ideas, fair and equal participation of parties affected by corporate decisions, respectful consideration of expressed viewpoints, and the ability to change previously held positions through continual discourse.[68] The first article in this series spelled out in great detail the general philosophical construct of discourse theory.[69] Rather than simply regurgitate previously covered ground, a brief recapitulation of the basic tenets of discourse theory provides a sufficient background for exploring new territory regarding the legal standard and modes of discourse necessary to implement the theory.[70]

First, the bedrock foundation of discourse theory involves a distinction between communicative action and strategic behavior. Communicative action represents discourse aimed at a common goal.[71] In contrast, strategic action arises when actors attempt to reach selfish outcomes through weapons, goods, threats, or enticements.[72] Defined that way, engaging in communicative action

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[68] *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 118–31 (William Rehg trans., MIT Press 1996) (1992) [hereinafter HABERMAS, BETWEEN FACTS]; JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 76–98 (Christian Lenhardt & Shierry Weber Nicholsen trans., MIT Press 1990) (1983) [hereinafter HABERMAS, MORAL CONSCIOUSNESS]; 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, REASON AND THE RATIONALIZATION OF SOCIETY (Thomas McCarthy trans., Beacon Press 1984) (1981) [hereinafter HABERMAS, COMMUNICATIVE ACTION, VOL. 1]; 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON (Thomas McCarthy trans., Beacon Press 1987) (1981); JÜRGEN HABERMAS, ON THE PRAGMATICS OF COMMUNICATION (Maeve Cooke ed., 1998).

[69] *See* Siebecker, *supra* note 12, at 198–208.

[70] *See infra* Parts IV–V. For additional works suggesting democratic deliberation should apply in some corporate contexts, see generally Anupam Chander, *Googling Freedom*, 99 CALIF. L. REV. 1, 10–14 (2011); Renee M. Jones, *Legitimacy and Corporate Law: The Case for Regulatory Redundancy*, 86 WASH. U. L. REV. 1273, 1278–86 (2009); MaryAnn Reynolds & Kristi Yuthas, *Moral Discourse and Corporate Social Responsibility Reporting*, 78 J. BUS. ETHICS 47, 53–62 (2008); Helen Wadham, *Talking Across Boundaries: Business and NGO Perspectives on CSR, Sustainable Development and Partnership*, 34 J. CORP. CITIZENSHIP 57, 59–60 (2009).

[71] HABERMAS, COMMUNICATIVE ACTION, VOL. 1, *supra* note 68, at 307–08; *see also* Michel Rosenfeld, *Law as Discourse: Bridging the Gap Between Democracy and Rights*, 108 HARV. L. REV. 1163, 1168–69 (1995) (book review) ("In communicative action, on the other hand, actors are oriented toward reaching a common understanding rather than achieving personal success. The model for communicative action is that of an idealized community of scientists gathered together to ascertain the truth of a scientific hypothesis.") (footnote omitted).

[72] *See* HABERMAS, MORAL CONSCIOUSNESS, *supra* note 68, at 133–34.

necessarily involves an implied commitment to eschew selfish promotion of specific results and to accept ground rules that promote full, fair, and rational discourse among the parties engaged.[73] Although Habermas focuses primarily on deliberation within formal governmental institutions, communicative action also occurs in non-governmental institutions, including associations, interest groups, and corporations.[74] The following section identifies some of the most prominent aspects of modern corporate practices that involve communicative action, and thus, a commitment to moral discourse rather than strategic behavior.[75]

Second, the "discourse principle" guides effective deliberation within any instance of communicative action. The principle mandates recognizing the rights of affected parties to participate in discourse.[76] In the absence of coercion of any kind, the discourse principle requires giving participants the right to introduce desired propositions, to challenge expressed viewpoints, and to change positions over time through continual discourse.[77] Though certainly an aspirational set of criteria for ideal deliberation, the discourse principle represents a set of procedural mechanisms to ensure just outcomes.[78]

Third, transparency and accountability represent tandem core components of proper discourse.[79] Deliberative secrecy undermines the ability of affected parties to challenge propositions or introduce alternatives.[80] Constituencies cannot effectively understand why a particular decision resulted without knowing the path deliberations actually followed.[81] Moreover, without transparency, accountability remains illusive, for it remains impossible to hold parties accountable for deliberative failures without knowing the positions and strategies parties actually adopted within the debate.[82]

Fourth, legitimacy occupies a central role in discourse theory. For individuals engaged in communicative action to accept themselves as bound by

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[73] *Id.* at 134; Rosenfeld, *supra* note 71, at 1169 ("Habermas argues that the very agreement to engage in communicative action implies a voluntary submission to certain normative constraints embedded in the discursive practice itself. Thus, given an equal opportunity to present arguments and a genuine commitment to being persuaded only by the force of the better argument in a rational discussion, actors engaged in communicative action would only accept as legitimate those action norms upon which all those possibly affected would agree *together* to embrace on the basis of good reasons." (footnote omitted)).

[74] Rainey & Rehg, *supra* note 67, at 1963–64; Siebecker, *supra* note 12, at 201.

[75] *See infra* Part IV.B.

[76] JAMES GORDON FINLAYSON, HABERMAS: A VERY SHORT INTRODUCTION 43–44 (2005); HABERMAS, BETWEEN FACTS, *supra* note 68, at 108–09.

[77] FINLAYSON, *supra* note 76, at 43; HABERMAS, MORAL CONSCIOUSNESS, *supra* note 68, at 89.

[78] *See* FINLAYSON, *supra* note 76, at 44.

[79] *See* Jones, *supra* note 70, at 1285.

[80] *See* AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 95 (1996).

[81] *See* Jones, *supra* note 70, at 1285.

[82] *See id.*

the various rules for morally acceptable discourse, participants must see themselves as authors of the rules themselves.[83] Even if the discourse produces outcomes at odds with any particular individual's preferences, the deliberative processes that gave rise to the outcomes must garner common acceptance.[84] The tenets of discourse theory, then, must garner rational appreciation of the procedural correctness and justice of the deliberative mechanisms employed.[85] To the extent the procedures inspire full, fair, and equal participation among affected parties, the sense of legitimacy should obtain.[86]

Following that brief recapitulation of the basic tenets of discourse theory, understanding how corporations engage in communicative action represents the next step in building a new discourse theory of the firm. For only if corporations pursue communicative action in various contexts do the tacit moral commitments for just rules of discourse come into play.

B. *Communicative Action and the Corporation*

Many of the most important functions of public corporations constitute instances of communicative action. The basic fiduciary duties owed to shareholders, the election of directors by shareholders, the shareholder proxy proposal process, and the mandatory disclosure and reporting requirements embedded in the securities laws all involve detailed communication among corporations, shareholders, and other public constituencies to achieve specific goals.[87] In essence, those fundamental corporate practices entail corporate communicative actions that should require a moral commitment to full and fair discourse within each context considered.

Before examining more fully how each of those corporate practices represents communicative action, however, gaining a slightly better understanding of the amenability of corporate law to discourse theory seems essential. After all, it might seem a bit odd to apply rules of discourse to govern

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[83] *See* HABERMAS, BETWEEN FACTS, *supra* note 68, at 454 ("The addressees of law would not be able to understand themselves as its authors if the legislator were to discover human rights as pregiven moral facts that merely need to be enacted as positive law.").

[84] *See* Michel Rosenfeld, *Can Rights, Democracy, and Justice Be Reconciled Through Discourse Theory? Reflections on Habermas's Proceduralist Paradigm of Law*, 17 CARDOZO L. REV. 791, 805 (1996).

[85] *See id.* ("[T]he legitimacy of law is to be gauged from the standpoint of a collectivity of strangers who mutually recognize one another as equals and jointly engage in communicative action to establish a legal order to which they could all accord their unconstrained acquiescence. By means of communicative action, a reconstructive process is established through which the relevant group of strangers need only accept as legitimate those laws which they would all agree both to enact as autonomous legislators and to follow as law abiding subjects.").

[86] William E. Forbath, *Habermas's Constitution: A History, Guide, and Critique*, 23 LAW & SOC. INQUIRY 969, 992 (1998).

[87] *See* Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 78–79 (2005); *see also infra* Parts III.B.1–3.

corporate practices given the ostensibly dominant profit-making motive of corporations.[88] Many scholars already focus on the importance of institutionalizing robust dialogue within corporate settings and apply formal discourse theory to corporate law problems.[89] Habermas, however, raised some concern that corporations could play a healthy role in promoting and sustaining fair discourse.[90] Despite the Supreme Court's rejection of the argument that massive corporate wealth distorts public debate,[91] the fear is that concentration of massive wealth and power within the corporate stronghold would render the playing field so uneven as to make fair deliberation about any matter impossible.[92] Implicitly rejecting the limitations Habermas might have placed on the contexts in which his theory might thrive, scholars still suggest that robust discourse within corporate structures can enhance the quality of debate at the societal level.[93] That corporations possess extreme wealth, potentially destroying the possibility for fair discourse, simply spurs the need to apply

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[88] *See* William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 655–66 (2010); *see also* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 549 (2003).

[89] *See, e.g.*, Angus Corbett & Peta Spender, *Corporate Constitutionalism*, 31 SYDNEY L. REV. 147, 154 (2009); Lisa M. Fairfax, *Easier Said than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 773–74 (2007); Fairfax, *Making the Corporation Safe*, *supra* note 63, at 55.

[90] HABERMAS, BETWEEN FACTS, *supra* note 68, at 350 ("The constitutional structure of the political system is preserved only if government officials hold out against corporate bargaining partners and maintain the asymmetrical position that results from their obligation to represent the whole of an absent citizenry, whose will is embodied in the wording of the statutes."); *see also* JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS 117 (Max Pensky ed. & trans., Polity Press 2001) (1998); Rosemary J. Coombe & Jonathan Cohen, *The Law and Late Modern Culture: Reflections on* Between Facts and Norms *from the Perspective of Critical Cultural Legal Studies*, 76 DENV. U. L. REV. 1029, 1046 (1999) ("Habermas, like many contemporary constitutional theorists, clearly recognizes the dangers of corporate control and concentration of ownership, and the effects of free market principles in limiting the cultural resources, information, and modes of argumentation available to us in a consumer society.").

[91] *See* Citizens United v. FEC, 588 U.S. 310, 348–49 (2010).

[92] *See* Akilah N. Folami, *From Habermas to "Get Rich or Die Tryin": Hip Hop, the Telecommunications Act of 1996, and the Black Public Sphere*, 12 MICH. J. RACE & L. 235, 240–41 (2007).

[93] *Id.* at 241 ("Scholars such as David Skover, Rosemary Coombe, Kenneth Aoki and others have explored the ways in which the market, the mass media, and even commodified identities can be used as a source and basis of political resistance to the larger public discourse. In fact, they have argued that failing to acknowledge, as Habermas does, such sites as spaces of contestation simply misses the mark when analyzing how individuals of the current, post-modernist, 21st century, consumer-oriented, mass-mediated, society form views about themselves and others, which in turn shapes their political identities and expressions.").

discourse theory principles to correct the imbalance.[94] Thus, mitigating the negative effects of excessive corporate wealth on public debate requires rendering internal corporate decision-making processes consistent with discourse theory.[95]

Following that logic, the import of structuring internal corporate rules around discourse stems from the relationship between the corporation and the state.[96] After *Citizens United*, the influence of corporations in shaping public opinion, dominating political debate, and affecting the outcome of elections will continue to grow.[97] As a result, corporate law needs to embrace robust rules for full and fair discourse that engender a sense of legitimacy in the political realm.[98] Because the private boardroom in many ways replaces the public sphere in which political decisions get made, ensuring a minimal sense of legitimacy in the political system may very well require giving corporate

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[94] *See* Coombe & Cohen, *supra* note 90, at 1039 ("By excluding realms of private law and market forces from the space he regards as political, the model of democracy Habermas provides would keep existing allocations of communicative power intact while entrenching corporate dominance over realms of public communication."); *see also* Tonia Novitz & Phil Syrpis, *Assessing Legitimate Structures for the Making of Transnational Labour Law: The Durability of Corporatism*, 35 INDUS. L.J. 367, 373 (2006) ("Nevertheless, it is possible to distinguish corporatism from deliberative democratic theory in at least three respects. Firstly, deliberative democracy, at least in the form proposed by Jürgen Habermas, indicates that policy-making should be responsive to groupings of all interests which spontaneously emerge within civil society, and like pluralism, calls into question the privileged representation of management and labour under corporatist structures.").

[95] Rosenfeld, *supra* note 71, at 1175 ("Actually, Habermas accepts the inevitability of the administrative state with its bureaucracy, large corporate organizations, and dominant mass media. . . . In other words, if a law can be reconstructed through the discourse principle counterfactual as being genuinely self-imposed pursuant to a consensus among all those who come under its sweep, then any rational actor must acknowledge its normative validity. Consistent with this, Habermas's proceduralist paradigm does not predetermine the content of any legitimate law but merely lays down the procedural requirement that laws satisfy the discourse principle to establish their normative validity.").

[96] Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. J. INT'L L. & POL. 1, 21 n.67 (2006); Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT'L L.J. 471, 483 n.74 (2005).

[97] *See infra* Part IV.C.

[98] Gabriel Motzkin, *Habermas's Ideal Paradigm of Law*, 17 CARDOZO L. REV. 1431, 1435 (1996) ("While institutionalizing the protection of the rights of the citizenry poses a difficult and never-ending problem, institutionalizing the active powers of the citizenry as lords and overseers of the political order is an even more difficult problem. Here the recourse to the apparently extra legal-public sphere serves Habermas well: a radicalization of his proposal would be one which would strip current semipublic bodies of their anonymity and informality and endow the semipublic bodies of a corporate citizenry with analogous powers. The recipe, then, is that of democratizing corporate power and its transformed application outside of the sphere to which it has been previously confined. Against the objection that such a democratization would wound the apparent inviolacy of individual rights, Habermas's analysis concludes that such an inviolacy of individual rights is only apparent and theoretical. Individual rights are already dead. The question is how to revitalize them.").

constituencies a more meaningful voice regarding the political positions corporations pursue.[99]

Thus, with the inevitable melding of the corporate and political worlds cemented by the decision in *Citizens United*, the need for a discourse theory of the firm comes both from external concerns about the justice of our political system and from internal concerns regarding the effective modes of corporate organization. Both the external and internal motivators for enhanced discourse need to take into consideration the evolving nature of the firm and its relationship to shareholders and other affected constituencies.[100] Although strong arguments exist for relying on discourse theory to restructure internal corporate governance rules in order to provide a more efficient and descriptively accurate account of how corporations and shareholders actually relate to each other, the need to maintain legitimacy in our democracy provides a special impetus for revisiting the basic theories upon which corporate jurisprudence rests.

1. *Fiduciary Duties*

Fulfilling the basic duties of care and loyalty that ensure directors and officers act on behalf of shareholders represents a clear instance of communicative action directed toward proper corporate governance. The duties of care and loyalty arise out of essential fiduciary bonds of trust.[101] Only through legal obligations of trust can shareholders feel protected from the self-interest of corporate managers who might use business assets or opportunities for their own personal gain, rather than for the good of the ultimate owners of the company.[102]

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[99] *See* Corbett & Spender, *supra* note 89, at 149–50 (describing a corporate constitutionalism that relies on greater deliberation within the corporate setting to ensure a sense of legitimacy in the polity).

[100] *See* BOTTOMLEY, *supra* note 64, at 12 (suggesting that greater discourse with the corporate setting remains essential to ensure accountability, deliberation, and contestability); *see also* Corbett & Spender, *supra* note 89, at 150 ("(1) Accountability—corporate decision-making processes should be characterised by a separation of decision-making powers. (2) Deliberation—corporate decisions should be subject to deliberation. (3) Contestability—corporate decisions which do not track the interests of members should be readily contestable.").

[101] *See* Richard N. Ottaway, *Defining Trust in Fiduciary Responsibilities*, *in* THE ETHICS OF ACCOUNTING & FINANCE: TRUST, RESPONSIBILITY, AND CONTROL 3, 3 (W. Michael Hoffman et al. eds., 1996) ("In some ways, there is no role in fiduciary relationships other than trust."); Sarah Helene Duggin & Stephen M. Goldman, *Restoring Trust in Corporate Directors: The Disney Standard and the "New" Good Faith*, 56 AM. U. L. REV. 211, 256–65 (2006); Lawrence E. Mitchell, *The Importance of Being Trusted*, 81 B.U. L. REV. 591, 614–17 (2001) (discussing the essential nexus between trust and fiduciary relationships).

[102] *See* JERRY W. MARKHAM, A FINANCIAL HISTORY OF MODERN U.S. CORPORATE SCANDALS FROM ENRON TO REFORM 246–310 (2006); Leslie, *supra* note 87, at 76–80 (discussing the evolution and basic role of fiduciary duties under corporate law).

Fulfilling trust, however, cannot occur inside an intellectual vacuum. Properly understood, trust in the context of corporate fiduciary duties reflects a rational expectation by shareholders that corporate managers take into account, or encapsulate, shareholder interests when deciding what corporate action to pursue.[103] No such rational expectation can occur without some incentives—legal or otherwise—for corporate managers to assess effectively the actual interests of shareholders.[104]

Neoclassical law and economic theory simply assumes that shareholders remain primarily focused on short-term wealth maximization.[105] But that theory of shareholder identity based on a wholly stylized and stilted notion of human rationality receives fast criticism as unmoored in reality.[106] In making decisions, real individuals take into account a variety of interests (such as familial relationships, friendships, health, ethics, and moral values) that are not readily converted into a monetary metric.[107] As the $32 trillion CSR market demonstrates,[108] *actual* shareholders value more than simple short-term wealth gains. In swiftly increasing numbers, shareholders (and consumers) take into account a variety of social, environmental, ethical, and political criteria in deciding whether to purchase a company's stock (or products).[109] Although some shareholders may indeed focus on short-term wealth maximization, that characterization does not describe accurately all shareholders or their interests. To the extent shareholders possess interests that target the rights or concerns of other stakeholder groups, taking account of those ancillary stakeholder interests as well remains necessary to gain a proper understanding of shareholder preferences.

The ability to trust sensibly that corporate managers encapsulate shareholder interests depends on a sort of due diligence.[110] Quite simply, shareholders must be able to expect that officers and directors take into account the values that shareholders actually possess in deciding what path the corporation should follow. Though certainly not requiring managers to heed every shareholder interest, the fiduciary bond requires at least an effort at identification.[111] Simply assuming that shareholder interests remain tethered to wealth maximization represents an addled approach that ignores empirical

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[103] *See* RUSSELL HARDIN, TRUST AND TRUSTWORTHINESS 10 (2002); Russell Hardin, *Do We Want Trust in Government?*, *in* DEMOCRACY AND TRUST 22, 26 (Mark E. Warren ed., 1999); Siebecker, *supra* note 47, at 150.

[104] *See* Siebecker, *supra* note 47, at 152–54 (discussing Hardin's notion of competence as an essential component of the trust relationship).

[105] *See* Cynthia A. Williams, *A Tale of Two Trajectories*, 75 FORDHAM L. REV. 1629, 1657 (2006).

[106] *See id.*; Douglas A. Kysar, *Sustainability, Distribution, and the Macroeconomic Analysis of Law*, 43 B.C. L. REV. 1, 4–5 (2001).

[107] *See* Williams, *supra* note 105, at 1657; *see also* Kysar, *supra* note 106, at 4–5.

[108] *See supra* note 6 and accompanying text.

[109] *See supra* Part II.B.

[110] *See* Siebecker, *supra* note 47, at 152–54.

[111] *Id.*

evidence and the increasingly loud collective voices of shareholders who claim different preferences.[112] For trust to flourish and the fiduciary duties of care and loyalty to endure as meaningful concepts, a continual dialogue between shareholders and managers must take place.[113] That reflexive dialogue no doubt represents a form of communicative action that should then comport with the tenets of discourse theory. The discussion in the next Part articulates the legal standards for enforcing the dialogue and the modes of discourse that corporations could employ to satisfy their obligations.[114] Recognizing that fulfilling the bedrock fiduciary duties of care and loyalty requires communicative action, however, represents a necessary step in advancing a new discourse theory of the firm.

2. *Proxy Solicitation and Shareholder Proposals*

The solicitation of shareholder votes through the corporate proxy entails another obvious example of communicative action directed at good governance.[115] The election of directors by shareholders serves as one of the primary pillars of corporate law.[116] For public companies, the U.S. securities laws and regulations require corporations to submit a vast amount of detailed information to shareholders in order to provide an adequate basis for making informed decisions.[117] Those disclosures remain subject to stringent antifraud provisions that attempt to bolster the integrity of the electoral process.[118] Beyond the election of directors, shareholders vote on a variety of other extraordinary measures, often including among other matters, mergers, consolidations, changes to the corporate charter, and sale of all or substantially all of the company's assets. Each of those instances of voting entails mandated communication by the company to facilitate the shareholder voting decision.[119]

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[112] For a discussion of the need to assess the actual preferences and profiles of diverse stakeholders in corporate law, see Helen Anderson, *Creditors' Rights of Recovery: Economic Theory, Corporate Jurisprudence and the Role of Fairness*, 30 MELB. U. L. REV. 1, 24–25 (2006).

[113] *See* Siebecker, *supra* note 47, at 169–71.

[114] *See infra* Part IV.

[115] *See generally* J. Robert Brown, Jr., *The SEC, Corporate Governance and Shareholder Access to the Board Room*, 2008 UTAH L. REV. 1339 (discussing the historical relationship between shareholder activism and corporate governance).

[116] *See* Roberta S. Karmel, *Voting Power Without Responsibility or Risk: How Should Proxy Reform Address the Decoupling of Economic and Voting Rights?*, 55 VILL. L. REV. 93, 94 (2010).

[117] *See* Siebecker, *Corporate Speech*, *supra* note 51, at 655.

[118] *See* THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 3.3 (5th ed. 2005) (describing a variety of anti-fraud regulations embedded in the securities laws); ROBERTA ROMANO, FOUNDATIONS OF CORPORATE LAW 301 (Oxford Univ. Press 1993).

[119] For a description of shareholder voting rights and procedures, see LISA M. FAIRFAX, SHAREHOLDER DEMOCRACY: A PRIMER ON SHAREHOLDER ACTIVISM AND PARTICIPATION 7–27 (2011).

In addition, pursuant to SEC Rule 14a-8, shareholders enjoy the right to place on the corporate proxy various proposals related to the company's business practices, governance rights, and other matters of substantial importance to the corporation.[120] Although significant limitations exist on the subject matter of the proposals and corporations oppose shareholder proposals that eventually find their way to the corporate proxy, shareholders nonetheless exercise their proxy proposal rights with increasing frequency.[121] That shareholder proposals do not appear on the ultimate proxy does not betoken a failed proposal. Instead, instigating a proposal often leads to reflective discourse with corporate managers and ends in a negotiated settlement regarding a change in corporate policies or practices.[122] Regarding those proposals that actually appear for general consideration by shareholders, the proxy contains both a supporting statement from the proposing shareholder and a statement from management in opposition.[123] The process involves an extremely limited but pointed exchange of viewpoints for consideration among the shareholders qualified to vote on the matter.[124]

Shareholder voting on election of directors and other matters closely resembles the election of government officials and referenda processes typical in democracy.[125] The processes of electing representatives to govern our collective lives and change laws through public referenda constitute exercises in sustained discourse. That discourse involves not just the provision of information about the final question upon which the ultimate vote occurs, but also a sustained discourse about who stands for office and what issues find their way onto the ballot.[126]

The primary role of discourse in the voting process does not change when the context shifts from politics to corporate organization and behavior. Certainly, members of corporate boards do not serve in the same capacity as U.S. Senators. But as corporations increasingly dominate our economic, social, and political lives, election to the board of a Fortune 100 company may be of much greater aggregate importance than who serves as county clerk in an isolated rural area.[127] Moreover, with respect to the formal electoral constituency of shareholders, the discourse with corporations remains highly regulated and includes penalties for misstatements or omissions.[128] The notion is not to suggest that the protection the First Amendment affords to even false speech in the political arena is misplaced. Instead, the observation intends to

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[120] *See id.* at 63–84.

[121] *See* U.S. SIF FOUND., *supra* note 46.

[122] *See* FAIRFAX, *supra* note 119, at 82–83.

[123] *See id.* at 64–66.

[124] *See id.*

[125] *See* Lee, *supra* note 64, at 151–52.

[126] BOTTOMLEY, *supra* note 64, at 115–17.

[127] *Id.* at 118–19, 177–78.

[128] 15 U.S.C. § 78n (2012); 17 C.F.R. § 240.14a-9 (2012); *see also* Siebecker, *Corporate Speech*, *supra* note 51, at 663–64.

underscore the centrality and import of discourse in the corporate context as well. Just as in the political sphere, the process of election and referenda in the corporate setting represent instances of communicative action designed at achieving good governance.[129]

Under the panoply of state and federal laws governing the corporate electoral system, the discourse remains quite unidirectional from the corporation to shareholders, without sufficient ability of shareholders or other stakeholders to set the agenda or exercise choice regarding who stands for election.[130] In contrast to prevailing corporate law doctrine, a discourse theory of the firm would better account for the centrality of dialogue to the ballot process and ensure greater fairness and effectiveness to that particular form of corporate communicative action.

3. *Mandatory Disclosure and Reporting*

The system of mandatory disclosure of and reporting by public companies of quantitative and qualitative data represents yet another clear example of communicative action. The securities laws, and the SEC rules and regulations promulgated thereunder, provide an incredibly intricate scheme for the collection, reporting, and dissemination of corporate information.[131] Whether in the context of quarterly or annual reports, proxy solicitation, or public offerings of securities, the securities laws compel companies to disclose not just hard financial data but soft qualitative information regarding the company's code of ethics,[132] business operations,[133] competitive risks,[134] legal proceedings,[135] internal controls over financial data,[136] executive compensation policies,[137] and management's discussion and analysis (MD&A) of the company's financial conditions and operations.[138]

The vast mandatory disclosure system intends to provide integrity and trust in the capital markets. The backbone of the securities regulation regime emerged in the aftermath of the stock market crash in 1929, itself a result of a lack of adequate transparency and veracity of information companies publicly disclosed.[139] More recent corporate scandals continue to produce new securities

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129 *See* Fairfax, *supra* note 89, at 773–74. *See generally* Brown, *supra* note 115.

130 *See* STEPHEN M. BAINBRIDGE, CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS 233–36 (2012).

131 17 C.F.R. §§ 229.301–.302 (2012).

132 *Id.* § 229.406.

133 *Id.* § 229.101.

134 *Id.* § 229.305.

135 *Id.* § 229.103.

136 *Id.* § 229.308.

137 17 C.F.R. §§ 229.403–.405.

138 *Id.* § 229.303.

139 HAZEN, *supra* note 118, at 14–15; LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 35–36 (5th ed. 2004).

regulation initiatives that hope to correct persistent flaws in the communication by corporations to consumers and investors.[140] Despite those efforts to stem the tide of corruption, a corporate hubris still spurs what seems a systemic dissembling.

The project here is not to recount the various corporate scandals and their effects on the capital markets in the United States and around the world. Instead, the intent is merely to demonstrate that the incredibly broad system of securities regulation centers on communication between public companies and the market. Despite strict regulation through a host of antifraud protections, the quality of communication seems woefully inadequate to secure the expressed historical goals of the securities regulations themselves. A spate of corporate scandals and a crisis of confidence in the capital markets endure.[141]

Curing the communication defect requires an approach that adopts a less unidirectional focus. Current securities regulations almost exclusively focus on communication from the corporation to the public, but do not address the degree to which corporations should—and in what way—solicit the opinions of the market.[142] That side of the conversation seems left to invisible market incentives. Absent plucky shareholders or stakeholder groups who value the changes they advocate more than the cost of expressing their viewpoints and securing change, the securities laws provide little impetus for public input in corporate conversations. Similarly, the securities laws leave to corporations to determine the extent to which, if at all, managers take into account market preferences in determining the content, timing, and dissemination of information relevant to certain consumers and investors.[143] Rather than facilitating an ongoing dialogue between corporations and the constituencies they serve, the securities laws remain significantly entrenched in a view of the corporation as promoting a profit-maximizing institution that would not benefit from discourse.[144] The static regime of securities regulation simply requires corporations to spew specific tidbits of information that a mythical "reasonable" investor would find relevant in making a decision to purchase a company's

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[140] *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5641 (2012), 15 U.S.C. §§ 78j-3, 78j-4, 78l, 78n-1 (2012)); Trust Indenture Act of 1939, Pub. L. No. 76-253, 53 Stat. 1149 (codified as amended at 15 U.S.C. §§ 77aaa–77bbbb (2012)); Securities Investor Protection Act of 1970, Pub. L. No. 91-598, 84 Stat. 1636 (codified as amended at 15 U.S.C. §§ 78aaa–78lll (2012)); Investment Company Act of 1940, Pub. L. No. 76-768, 54 Stat. 789 (codified as amended at 15 U.S.C. §§ 80a-1 to 80a-64 (2012)); Investment Advisers Act of 1940, Pub. L. No. 76-768, 54 Stat. 847 (codified as amended at 15 U.S.C. §§ 80b-1 to 80b-21 (2012)); Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended at 15 U.S.C. §§ 7201–7266 (2012)); Public Utility Act of 1935, Pub. L. No. 74-333, 49 Stat. 803 (repealed 2005).

[141] *See* BAINBRIDGE, *supra* note 130, at 3–15.

[142] *Id.* at 255–58.

[143] *See* Siebecker, *supra* note 47, at 118–19.

[144] Siebecker, *Corporate Speech*, *supra* note 51, at 651–71.

stock.[145] That stance seems particularly backwards because the securities regulation regime operates mostly through the regulation of compelled speech designed to promote the collective goal of integrity in the capital markets.[146] As such, the system of mandatory disclosure and periodic reporting represents an obvious form of communicative action that should require some more robust principles of discourse to ensure achieving those goals. Recognizing the securities regulation regime as a complex form of communicative action would help guide the evolution of securities regulation in a manner that might better stave the ongoing onslaught of challenges to the basic integrity of the capital markets.

IV. STANDARDS FOR ENFORCING CORPORATE COMMUNICATION

The serious maladies plaguing corporate law diagnosed at the outset of this Article stem from anemic existing corporate law principles incapable of attending accurately to the evolving nature of the firm and the role shareholders and other stakeholders should play in corporate governance. The systemic failures involving instances of corporate communicative action lie at the core of prevailing business theory and practice. Thus, the healing process for currently diseased corporate law doctrine must begin with a regimen of enhanced discourse in contexts of corporate communicative action. As discussed earlier regarding the blueprints for a discourse theory of the firm, the goal is to provide rules and incentives that promote autonomous expression of ideas, fair and equal participation of parties affected by corporate decisions, respectful consideration of expressed viewpoints, and the ability to change previously held positions through continual discourse.[147] Using the discourse principle as an overarching guide, the legal standards should promote enhanced engagement, transparency, accountability, and ultimately legitimacy.

Admittedly, the standards proposed do not fully implement an ideal discourse. That should engender pragmatic confidence rather than a sense of ultimate failure. For the standards proposed do not rest on a revolutionary spirit but instead attempt to instantiate rules that accommodate the reality of the world we actually inhabit. The goal in this Article is not to make perfect the enemy of the good, and as a result, the standards promoted could fit very easily within existing corporate law constructs. With that caveat in mind, standards for implementing a new discourse theory for the firm can take place on a variety of legal fronts including common law, statutes, administrative rules, and non-governmental standards. Of course, implementing rules and incentives that would more effectively realize a new discourse theory of the firm would ideally take place on all legal fronts. But adopting robust discourse standards in any of

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[145] *See* Tom C.W. Lin, *The New Investor*, 60 UCLA L. REV. 678, 694–95 (2013).

[146] For a full discussion of how the securities regulations compel and restrict speech to insure market integrity, see Siebecker, *Corporate Speech*, *supra* note 51, at 651–71.

[147] *See supra* Part III.A.

those legal forums would at least diminish the ill effects of a diseased regime under which corporations, shareholders, and other stakeholders currently suffer. In the end, adopting new standards for enhanced discourse in corporate law should not trigger fear of radical change.[148] Instead, structuring new corporate doctrine around discourse principles simply provides both a more descriptively accurate account of how corporations actually behave in modern society and a normatively superior framework for addressing novel questions of law as the corporation and its constituencies continually evolve.

A. *Common Law*

Common law mechanisms targeting the fiduciary duties of care and loyalty represent perhaps the least intrusive, yet most effective, means to spur robust discourse. With respect to the duty of care, the change would require reinterpreting the presumptive blanket protection currently afforded board decisions under the "business judgment rule."[149] As currently conceived, the rule insulates directors from liability for poor business choices, as long as the decisions did not involve fraud, illegality, a conflict of interest, or gross negligence (which can include wholly irrational or wasteful decisions).[150] Corporate managers enjoy extraordinary protection from liability in the absence of the situations that destroy the umbrella of protection the presumption provides.[151] Instances in which courts impose liability represent legal "blips" where board members simply act precipitously without minimally adequate information, reflection, or questioning of the basis for business decisions.[152]

The common law change would require interpreting the gross negligence exception to include a failure to require some minimal discourse with shareholders to ensure the board took the actual interests shareholders possess into account. In essence, it would reflect a proper understanding of the notion of trust that undergirds the very notion of a fiduciary duty. Trust cannot exist without a rational expectation that those in whom we bestow our trust encapsulate in some minimal way our actual interests.[153] As discussed above, shareholders could not rationally expect corporate managers to take their

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[148] *See* Kelli A. Alces, *The Equity Trustee*, 42 ARIZ. ST. L.J. 717, 735–54 (2010) (discussing an incremental approach to securing greater shareholder say in governance by working within existing legal structures).

[149] For a general discussion of the business judgment rule in the context of shareholder democracy, see Robert Sprague & Aaron J. Lyttle, *Shareholder Primacy and the Business Judgment Rule: Arguments for Expanded Corporate Democracy*, 16 STAN. J.L. BUS. & FIN. 1, 3 (2010).

[150] *See* Geoffrey P. Miller, *A Modest Proposal for Fixing Delaware's Broken Duty of Care*, 2010 COLUM. BUS. L. REV. 319, 324–25; Michael R. Siebecker, *The Duty of Care and Data Control Systems in the Wake of Sarbanes–Oxley*, 84 CHI.-KENT L. REV. 821, 825–26 (2010).

[151] Siebecker, *supra* note 150.

[152] *Id.*

[153] *See* Siebecker, *supra* note 47, at 158–60.

interests into account when making business decisions unless the board members engage in some basic effort at identifying what interests the actual shareholders of the company possess.[154] By simply assuming all shareholders desire short-term wealth maximization, corporate actors cannot fulfill any sensible construct of trust. Instead, corporate managers would need to conduct some minimal due diligence to discern the variety and intensity of shareholder interests.[155] And to the extent shareholders possess preferences regarding matters that concern other corporate stakeholders (e.g., working conditions of overseas laborers, environmental practices, non-discrimination employment standards, etc.), that minimal due diligence would require assessing certain stakeholder interests as well.[156]

What makes a failure to engage in this minimal due diligence a matter of gross negligence (and arguably waste) is the effect that failing to take into account the manifest preferences of actual shareholders and stakeholders would have on the viability of the $32 trillion market for CSR. In light of the undeniable empirical evidence that such a market exists and considering the increasing efforts of corporations to court shareholders and consumers with socially responsible preferences,[157] failing to engage in a minimal effort at identifying those interests is a version of managers simply sticking their heads in the sand. The market for morality will most certainly collapse unless corporate managers adequately take into account market preferences for the collection, reporting, and dissemination of truthful data regarding socially responsible business practices.[158] Ignoring the impending collapse by knowingly embracing a false assumption that all shareholders remain primarily interested in short-term wealth maximization is just as irrational as a child simply covering her eyes to avoid impending harm. As currently interpreted, the gross negligence exception to the business judgment rule has the retrograde effect of incentivizing corporate managers to act like irrational children and simply blithely blind themselves to the impending collapse of the market for CSR.

But with respect to the duty of care, what does that minimal effort at identifying shareholders and stakeholder preferences entail and how would courts actually enforce the standard? Quite frankly, a duty of care under a new

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154 *See supra* notes 103–104 and accompanying text.

155 *See* Siebecker, *supra* note 47, at 159–61.

156 Although in the first article in the series, I maintained that "[w]ith respect to stakeholder interests, then, it is not necessary to justify their direct participation in the discursive project involving corporate decisionmaking if some shareholders possess preferences for taking those stakeholder interests into account," *see* Siebecker, *supra* note 12, at 228, my approach has evolved in light of the significant political implications of *Citizens United* and corporate dominance of public discourse. Properly construed, a discourse theory of the firm would require directors to take into account non-shareholder interests directly in order to provide the best case for economic efficiency and political legitimacy.

157 *See supra* notes 23–31 and accompanying text.

158 *See supra* Part III.B.

discourse theory of the firm would not differ significantly from the current duty already in place. It would remain a *process*-based standard designed to ensure minimal integrity in the decisions managers render.[159] If attending to market preferences for CSR produces mutual gains—where the corporate cost of comporting with market preferences for certain CSR practices remains less than the premium CSR consumers and investors are willing to pay in increased stock and product price—then it seems wholly irrational and grossly negligent not to assess in some minimal way the existence of such win-win bargains. So if a disgruntled shareholder brought a claim alleging a business decision violated the duty of care for not taking into account the CSR preferences of certain shareholders, the board could completely insulate itself from liability simply by demonstrating that it had in place some rational mechanism for identifying, collecting, and interpreting those interests. The point of an effort at identification that involves some dialogue with corporate constituencies does not require managers to heed every shareholder or stakeholder concern. What seems grossly negligent and wholly irrational, however, is to ignore out of hand shareholder and stakeholder preferences that could provide greater welfare for all parties involved.[160]

Such a minimal process-based standard immediately invites criticism as insufficient to produce robust dialogue that the tenets of discourse theory require. Although certainly not a hollow claim, the criticism fails to take into account how the rule changes incentives and behaviors over time.[161] Currently, directors and corporate managers can simply ignore to a great extent shareholder and stakeholder concerns with virtual impunity. But they do so at the expense—literally—of significant potential economic gains of the corporation. The new minimal procedural rule starts the ball rolling down the hill as corporations realize that win-win gains exist through participating sincerely in the market for morality.[162] But if this is so ineluctably true in the long run that directors will realize the current folly of their ways in permitting corporate obfuscation of CSR communications, why do they even need a legal rule to coax them? Shouldn't logic simply serve as the guide to locate win-win exchanges? Were that true, there would be no need for the business judgment rule. But despite what some law and economics scholars hold dear, the market

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[159] *See* Siebecker, *supra* note 150, at 826–27.

[160] For a taxonomy of corporate fiduciary duties and an explication of the gross negligence exception to the business judgment rule, see Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?*, 83 S. CAL. L. REV. 1231, 1237–39 (2010).

[161] *See* Andrew S. Gold, *Dynamic Fiduciary Duties*, 34 CARDOZO L. REV. 491, 499–500 (2012) (describing interpretations of fiduciary duties as dynamic rather than static to account for evolving value, practices, and contexts).

[162] *See* Julian Velasco, *The Role of Aspiration in Corporate Fiduciary Duties*, 54 WM. & MARY L. REV. 519, 524–29 (2012) (describing the advantages and pitfalls of ambiguity in corporate fiduciary duties that provide more aspirational goals than concrete requirements for action).

does not in fact function perfectly.[163] Transaction costs, imperfect information, and unequal bargaining power pervade corporate life.[164] A slightly enhanced procedural standard for engaging shareholders will push corporate constituencies into a collective dialogue that in the long run should produce mutually beneficial outcomes.

With respect to the duty of loyalty, a discourse theory of the firm would require greater transparency and disclosure of corporate information, especially data regarding corporate political activities.[165] The heightened control corporations exercise in myriad aspects of economic, social, and political life already begs for greater transparency regarding corporate practices. As *Citizens United* affords corporations unprecedented new avenues for dominating the political agenda, the need for transparency in corporate political activity achieves a piercing pitch.[166] The special concern animating that disclosure is the heightened potential for corporate managers to shirk their fiduciary responsibilities and use the corporation's treasury to advance their own political preferences.[167] The potential for corporations to secretly dominate political agendas and outcomes in a manner inconsistent with shareholder preferences undoubtedly contributed to the recent spike of shareholder proposals regarding corporate political transparency.[168] Without disclosure of the political activities of corporations, shareholders cannot effectively hold managers accountable for their actions, participate effectively in the political positions corporations take,

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[163] *See* Shawn J. Bayern, *False Efficiency and Missed Opportunities in Law and Economics*, 86 TUL. L. REV. 135, 148 (2011) ("Recent history has highlighted the problematic assumption that factor markets operated with perfect efficiency, but market failures in factor markets should come as no surprise in general.").

[164] *Id.* at 145–51.

[165] *See* Amir N. Licht, *State Intervention in Corporate Governance: National Interest and Board Composition*, 13 THEORETICAL INQUIRIES LAW 597, 607 (2012) ("In a nutshell, the common law typically responds to agency (power) situations by imposing a duty of loyalty on agents, the core of which comprises a proscription on acting when in a conflict of interests and a duty of full disclosure of material information. Although these are the characteristic features of trust relations, in their very essence, these legal doctrines reflect suspicion and anything but blind trust; trust hinges on accountability and transparency." (footnote omitted)); David L. Ponet & Ethan J. Leib, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249, 1257 (2011) (discussing the connection between a duty of loyalty, candor, and deliberative democracy). For a general discussion of the connection between the duty of loyalty, transparency, and candor, see Thomas Lee Hazen & Lisa Love Hazen, *Duties of Nonprofit Corporate Directors—Emphasizing Oversight Responsibilities*, 90 N.C. L. REV. 1845, 1861–63 (2012).

[166] *See* Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683, 691–713 (2012) (arguing for disclosure of the corporate political activities following *Citizens United*).

[167] *See* William Alan Nelson II, *Post-*Citizens United*: Using Shareholder Derivative Claims of Corporate Waste To Challenge Corporate Independent Political Expenditures*, 13 NEV. L.J. 134, 137 (2012).

[168] Che Odom, *Chair Autonomy, Political Spending Most Popular 2013 Proxy Season Proposals*, 16 Corp. Governance Rep. (BNA) No. 12, at 133–34 (Dec. 2, 2013).

or know whether purchasing a corporation's stock or product at a particular price satisfies their preferences.[169]

Manifesting the disclosure of political corporate activity via common law duty of loyalty could attach to the duty to monitor corporate malfeasance through *Stone v. Ritter*[170] and its predecessor *In re Caremark.*[171] Both cases involved instances in which corporations allegedly failed to put in place information gathering and reporting systems that would enable the board to monitor effectively the presence of criminal or other nefarious activity within the corporation.[172] Although the source of the duty as articulated in *Caremark* stemmed from the duty of care, the Delaware Supreme Court in *Stone* stated that the duty to monitor more sensibly attaches to a duty of loyalty.[173] Regardless of the switch in the jurisprudential foundation for the duty, the ultimate standard articulated in *Stone* echoed the existing requirement that a corporation must not "utterly fail[] to implement any reporting or information system or controls" to detect corporate wrongdoing.[174] Applied in the context of a discourse theory of the firm, to ensure managers were not using the corporation to serve their own political ends at the expense of the corporation would require some minimal information gathering and reporting system regarding the political activities of the corporation and the connection of political positions to the basic business goals of the corporation.[175] An obvious basic component of any minimally adequate system would involve transparent collection and disclosure of political activities of the corporation.[176] Although it remains open how to assess if corporate political activities advance the economic interests of the corporation, without that basic first step of disclosure, any meaningful discourse about the political positions the corporation should adopt simply cannot take place. Though not ensuring full and fair discourse, the disclosure of political data through the duty of loyalty represents a necessary but not wholly sufficient condition to embrace a new discourse theory of the firm.

B. *Legislative*

Although slightly tweaking existing common law principles represents a minimally intrusive yet highly effective way to get the discourse ball rolling,

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[169] *See* Nelson, *supra* note 167, at 137–38.

[170] Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

[171] *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967–70 (Del. Ch. 1996).

[172] *See* Velasco, *supra* note 160, at 1232–37. For an extensive discussion of the evolving duty of oversight provided by *Stone* and *Caremark*, see *id.* at 1260–68.

[173] *Id.* at 1234.

[174] *Stone*, 911 A.2d at 370.

[175] *See* Paul S. Miller, *Shareholder Rights:* Citizens United *and Delaware Corporate Governance Law*, 28 J.L. & POL. 51, 77–78 (2012).

[176] *Id.* at 78–79 (describing information failures that prevent shareholders from monitoring director abuses of corporate political spending).

legislative initiatives provide another important and complementary component of corporate discourse theory. Positing that statutes mandate taking into account stakeholder interests or disclosing political activities should not seem striking in the least. On the domestic front, a great number of states already permit through non-shareholder constituency statutes the ability of directors and officers to take into account stakeholder interests that can involve employees, consumers, citizens of the community the corporation inhabits, and economies of the state, nation, and world.[177] A growing number of states also permit the formation of "benefit corporations" that mandate directors to consider stakeholder interests as part of the corporate charter.[178] Currently twenty states have passed legislation permitting benefit corporations and another eighteen states continue to consider adopting the new business form.[179] Taking those charges seriously would require engaging in some sort of discourse with the stakeholders considered. Ensuring those instances of communicative action produce adequate discourse could require articulation of concrete minimal steps for engagement or simply transparent public disclosure of the methods for ensuring discourse that the market could reward or punish.

Beyond state law, federal securities laws could accomplish a similar goal. Passed in the wake of a variety of massive corporate scandals, Sarbanes–Oxley[180] and the Dodd–Frank Act[181] already mandate additional disclosure of information relevant to ensure the integrity of the corporation and the capital markets. For instance, Dodd–Frank requires most public companies to disclose details of executive compensation[182] and provide an opportunity for a non-binding shareholder vote on the pay schemes.[183] Moreover, Sarbanes–Oxley requires public corporations to adopt and report a code of ethics or to announce why the corporation does not possess such a code.[184] Although some question the efficacy of the code of ethics disclosure requirement, the provision causes public corporations to adopt a more stakeholder-centric mode of conducting business and engaging society.[185] Within a discourse theory framework, that

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[177] *See* David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 526 (2011) (stating that as of 2003, forty-one states had enacted "constituency statutes" that authorized management to take into consideration a range of non-shareholder interests).

[178] *See* Celia R. Taylor, *Carpe Crisis: Capitalizing on the Breakdown of Capitalism To Consider the Creation of Social Businesses*, 54 N.Y.L. SCH. L. REV. 743, 759–61 (2010).

[179] *Legislation*, B CORP., http://www.bcorporation.net/what-are-b-corps/legislation (last visited Mar. 21, 2014).

[180] Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

[181] Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 951–956, 124 Stat. 1376, 1899–1906 (2010) (codified at 12 U.S.C. § 5641 (2012), 15 U.S.C. §§ 78j-3, 78j-4, 78l, 78n-1 (2012)).

[182] *Id.* §§ 953, 955–956.

[183] *Id.* § 951.

[184] 15 U.S.C. § 7264(a) (2012).

[185] *See* David Hess, *A Business Ethics Perspective on Sarbanes–Oxley and the Organizational Sentencing Guidelines*, 105 MICH. L. REV. 1781, 1790 (2007) (stating that a

existing mandate could be expanded to include a statement regarding the corporation's position regarding shareholder and stakeholder engagement. Without requiring any particular dialogue, it would force the issue to the forefront of the corporate agenda. Again, although not ensuring the full and fair discourse idealized under a discourse theory of the firm, a mandate requiring public disclosure of a policy regarding stakeholder engagement as part of a code of ethics would create an incentive for corporations to begin realizing the potential for win-win gains through more robust and inclusive dialogue.

In the international arena, statutory efforts to force a more robust dialogue with shareholders and stakeholders seem increasingly common. For instance, Section 172 of the Companies Act in the United Kingdom requires taking stakeholder interests into account in making business decisions.[186] Other countries, such as Peru, require a much more detailed dialogue between corporations and stakeholders to justify certain corporate actions.[187] Some might suggest that legislating the mechanics of full and fair discourse would produce excessive corporate costs and losses that ultimately disadvantage the constituencies whose viewpoints are considered. The point of exploring legislative initiatives is not to settle on a precise set of rules for discourse, but to underscore that legislation can provide incentives for corporations to engage groups that existing laws might allow them to ignore. And to the extent ignoring those market preferences creates the potential for economic loss, a set of rules that promote the need to search (arguably in a cost effective fashion) for mutual gains hardly seems detrimental.

C. *Administrative*

Even without additional legislative action, administrative agencies could at least require greater transparency, disclosure, and participation on a host of matters that would provide a stronger platform upon which to build a discourse theory of the firm. The SEC already requires disclosure regarding the effects of business practices on environmental issues and climate change.[188] Following *Citizens United*, a groundswell of support (and pressure) from shareholders and

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review of studies on codes of ethics adopted after Sarbanes–Oxley demonstrated that half were effective in reducing unethical behavior and half did not find a statistically significant effect). *But see* Jill E. Fisch, *The Overstated Promise of Corporate Governance*, 77 U. CHI. L. REV. 923, 932 (2010) (book review) ("Evolving governance norms and regulations such as Sarbanes–Oxley both address financial transparency and prescribe specific requirements for the board generally, and the audit committee in particular, designed to increase information flow and reduce capture of the independent directors. These reforms appear consistent with Macey's conception of effective governance." (footnote omitted)).

[186] Companies Act, 2006, c. 46, § 172 (Eng.).

[187] *See* Kevin O'Callaghan & Luis Carlos Rodrigo Prado, *Free, Prior, and Informed Consent: International Origins and Its Application in Canada and Peru*, 58 ROCKY MTN. MIN. L. INST. 18-1, 18-32 to 18-38 (2012) (discussing the level of community engagement and discourse to garner the necessary informed consent for certain mining projects).

[188] 17 C.F.R. § 229.101(c)(1)(xii) (2012).

other interest groups exists for new disclosure regulations targeting corporate political donations and activities.[189] Outside the SEC, other agencies participate in securing robust dialogue between corporations and various non-shareholder constituencies. For example, the Environmental Protection Agency (and similar state environmental agencies) require detailed environmental impact statements that require dialogue with communities prior to approving various corporate projects.[190]

Though arguably not sufficient to produce the kind of full and fair discourse that a new discourse theory of the firm envisions, administrative actions can work in conjunction with common law and legislative changes to form a new corporate law regime that assesses the legitimacy of corporate decisions and actions based on robust discourse. Such a doctrinal shift would not only produce greater effectiveness within the organizational structure of the corporation but an enhanced attentiveness to real market preferences that mark opportunities for wealth creation.

D. *Non-Governmental*

Non-governmental institutions can play significant roles in effecting a new discourse theory for corporate organization. Perhaps most obviously, securities exchanges, such as the New York Stock Exchange and the NASDAQ, establish their own rules regarding disclosure of corporate data.[191] As part of the bargain to gain access to the capital markets, the exchanges could require disclosure of information relevant to CSR-focused consumers and investors, including corporate political activity.[192] In addition, various professional institutions or organizations could incentivize corporations to engage in greater discourse with shareholders and stakeholders. Generally Accepted Accounting Principles (GAAP) could be altered to include disclosure of political contributions and activities.[193] Various international organizations, such as the United Nations[194]

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[189] Elizabeth Dwoskin, *SEC May Force Disclosure of Political Contributions*, BUSINESSWEEK (Jan. 16, 2013), http://www.businessweek.com/articles/2013-01-16/sec-may-force-disclosure-of-political-contributions (describing the public pressure animating the SEC's consideration of a new disclosure rule for political contributions); Odom, *supra* note 168.

[190] *See, e.g.*, Sarah E. Light, *NEPA's Footprint: Information Disclosure as a Quasi-carbon Tax on Agencies*, 87 TUL. L. REV. 511, 545–46 (2013) (discussing the nature of climate change disclosures required in the EPA environmental impact statement regarding the TransCanada proposed Keystone XL pipeline).

[191] Robert A. Prentice, *Regulatory Competition in Securities Law: A Dream (That Should Be) Deferred*, 66 OHIO ST. L.J. 1155, 1184–94 (2005).

[192] *See* Richard Moberly, *Sarbanes–Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 19 (2012) (describing the disclosure requirements on securities exchanges).

[193] Although plausible, many attribute recent corporate scandals to the failure of the accounting industry to engage in sufficient self-regulation to ensure transparency in the capital markets. *See* Fisch, *supra* note 185, at 932 n.50.

and the European Union's Eco-Management and Audit Scheme,[195] already require much greater political disclosures and public engagement of stakeholder interests. Moreover, rating agencies that grade debt securities could require the same political disclosures in order to render more accurate assessments of companies in light of their political commitments (granting that political commitments remain connected to financial performance).[196]

In the end, a host of common law, statutory, administrative, and non-governmental standards could be put in place to foster greater dialogue among corporate managers, shareholders, and stakeholders consistent with a new discourse theory of the firm. Although significant, the complementary standards remain rather minor changes in existing regulatory structures and, as a result, should not cause much consternation or paroxysm as unduly burdensome measures. How corporations might satisfy those new standards for discourse and disclosure represents the next step in fleshing out a new discourse theory of the firm.

V. MODES OF EFFECTIVE DISCOURSE

Although the preceding discussion regarding potential standards for corporate communication aimed at establishing rules and incentives that promote the basic tenets of discourse theory in the corporate context, some guidance needs to be provided regarding how corporations might satisfy those standards. Of course, some standards remain fairly easy to discern and apply. For instance, a statutory mandate requiring disclosure of corporate political contributions does not require great elaboration. In contrast, a safe harbor for satisfying a common law duty involving minimally sufficient processes for shareholder engagement floats in murkier waters. What constitutes a minimally sufficient reporting system to comport with a duty of loyalty? How does a corporation separate nettlesome shareholders from those that present opportunities for mutually beneficial exchanges that promote wealth creation?

The following discussion does not describe the full panoply of options for implementing a discourse theory of the firm. And again, the project remains wholly pragmatic rather than idealized. Dialogue among managers,

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194 United Nations, Global Compact Office, Corporate Sustainability in the World Economy (Jan. 2014), http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf (describing how signatories agree to disclosure in their annual reports the means by which corporations implement the ten principles of the Compact).

195 *See* Commission Regulation 1221/2009, 2009 O.J. (L 342) 1, 2 (EC) ("Organisations should produce and make publicly available periodic environmental statements providing the public and other interested parties with information on their compliance with applicable legal requirements relating to the environment and their environmental performance.").

196 *See* Sean B. Hecht, *Climate Change and the Transformation of Risk*, 55 UCLA L. REV. 1559, 1606–07 (2008) (suggesting that rating agencies play an important role along with government regulators and other CSR organizations to promote more environmentally responsible business practices).

shareholders, and other stakeholders that fully satisfies the tenets of discourse theory does not represent the goal, for perfection remains outside law's grasp in any context. Instead, the project now is to introduce a few mechanisms for securing a more robust dialogue among managers, shareholders, and other corporate stakeholders that reflect the diverse approaches to detailed organizational change centered on enhanced discourse. What links each is an attention to the social science of discourse that involves consideration of empirical evidence and theory. The modes of discourse cover a range of disciplines, including economics, sociology, psychology, political science, and organizational theory. Given the quickly burgeoning research on shareholder and stakeholder discourse, providing a comprehensive review of all possible approaches to robust and effective discourse remains implausible. And leaving somewhat ambiguous what methods satisfy the standards for minimally sufficient discourse could actually provide an incentive for continual prophylactic refinement in the face of uncertainty. Nonetheless, surveying a few mechanisms for effective discourse mechanisms provides starting points for solving the substantial problems infecting current corporate law doctrine.

A. *Strategic CSR*

Strategic CSR arguably provides the most alluring and effective mode of discourse by securing mutually beneficial gains among corporate managers, shareholders, and other stakeholders.[197] In simple terms, strategic CSR attempts to cultivate stakeholder communication that can produce economic gain to the corporation and avoid nettlesome distraction or capture by especially vested and vocal interest groups. The approach rests on the recognition of "[a]n emerging stakeholder management trade-off . . . definable as the call for a comprehensive identification of all stakeholders' expectations vs. the scarcity of resources in order to address all the identified stakeholder issues."[198] In light of the limitation on management resources to address all potential stakeholder or shareholder interests, business and society can succeed together only if corporate policies focus on opportunities for value creation rather than wallow in social conflict.[199]

In order for companies and society to secure mutual gains, strategic CSR attempts to identify through increasingly targeted discourse the specific social concerns that provide competitive advantages to business while producing

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[197] *See* Giacomo Boesso & Giovanna Michelon, *The Effects of Stakeholder Prioritization on Corporate Financial Performance: An Empirical Investigation*, 27 INT'L J. MANAGEMENT 470, 474 (2010).

[198] *Id.* at 471; *see also* Francisco J. Callado-Muñoz & Natalia Utrero-González, *Does It Pay To Be Socially Responsible? Evidence from Spain's Retail Banking Sector*, 17 EUR. FIN. MGMT. 755, 762–77 (2011) (using an empirical study to demonstrate that corporations must engage in dialogue to discern which CSR concerns provide financial gains and those that simply distract).

[199] Boesso & Michelon, *supra* note 197, at 471.

greater satisfaction to stakeholder groups.[200] Through discursive engagement with various stakeholder groups, corporations can divide stakeholder interests into concerns affecting long-term corporate sustainability (e.g., poor environmental or economic conditions), current business operations (e.g., implementing better pollution mitigation devices to avoid consumer flight), and social dimensions of competitive growth (e.g., investment in local education and transportation to expand the customer base).[201] Only when a symbiotic relationship exists between fulfilling stakeholder interests and enhancing corporate competitiveness does strategic CSR develop.[202] In essence, strategic CSR produces a classic win-win bargain.

Securing mutual gains often depends on revamping internal organizational practices to more accurately identify relevant stakeholders, their interests, and the potential opportunities for manager–stakeholder cooperation.[203] For example, Abe Zakhem suggests implementing a phased approach that utilizes "rational," "process," and "transactional" analyses to obtain targeted stakeholder engagement.[204] The rational phase broadly maps the various stakeholder groups and their interests, and the process stage examines the best means for engaging those groups based on discourse theory principles, including fairness and openness.[205] Finally, the transaction stage identifies opportunities for win-win trades, so that both managers and stakeholders gain not only in terms of satisfaction with the deliberative process but regarding the outcome of the negotiation itself.[206]

Of course, the viability of strategic CSR remains tethered to the existence of a business case for socially responsible business behavior. But in the sense considered here, strategic CSR goes beyond an assessment of whether investors and consumers will pay a premium in stock or product price for a company that engages in socially responsible practices. Taking a more holistic and longer-term approach, strategic CSR attempts through targeted stakeholder engagement to determine the various ways in which engaging in CSR might produce a competitive advantage for the company. Only with a nuanced engagement of

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200 *Id.* ("The interdependence of business and society is thus proposed as strategic guidelines in order to incorporate CSR in the core business choices and to provide practical guidance to corporate leaders in terms of how to anchor the interrelationships between a corporation and society in strategic planning."); *see also* Isaiah Yeshayahu Marom, *Toward a Unified Theory of the CSP–CFP Link*, 67 J. BUS. ETHICS 191, 197 (2006) ("The Unified Theory, which draws on the parallels between the CSR and business domains, exhibits a balance between financial rewards from satisfied stakeholders and costs incurred in producing social outputs.").

201 Boesso & Michelon, *supra* note 197, at 473–74.

202 *Id.* at 474.

203 *See* Michael R. Siebecker, *Communicative Action and the Corporation*, 1 INT'L J. BUS. & MGMT. STUD. 561, 564 (2012).

204 Abe Zakhem, *Stakeholder Management Capability: A Discourse-Theoretical Approach*, 79 J. BUS. ETHICS 395, 401–04 (2008).

205 *Id.*

206 *Id.*

various stakeholder interests and mechanisms for assessing how attending to those interests might affect financial performance over time can managers effectively sift through the cacophony of corporate voices that clamor for managerial attention.

B. *Stakeholder Solicitation*

Closely connected to strategic CSR, another avenue for enhanced discourse focuses on means to gather and interpret investor and consumer preferences regarding corporate governance and other CSR practices. From a social science standpoint, the approach intends to understand the dynamic ways in which the perceptions and preferences of consumers, investors, and stakeholders change based on continual corporate communications.[207] That effort facilitates the development of a more sophisticated set of processes to disseminate and collect information that corporate constituencies find important.[208] Some suggest using targeted discourse to solicit and shape investor preferences that can produce a positive framework for corporate growth and to discourage discourse that panders to special interests unconnected with overall economic health of the firm.[209] Even with respect to ostensibly nettlesome activists, corporate managers "should diagnose the likelihood of attracting activist investors by identifying where activists may see hidden value to be extracted, and plan the course ahead."[210]

The solicitation of shareholder and stakeholder preferences plays an important mitigating function in sustaining the health of the corporation when crises arise. As the American Bar Association (ABA) reported in a recent study, when corporations put in place discourse mechanisms to take seriously the viewpoints of consumers and investors on a variety of issues regarding corporate practices and governance, the corporation gains stability and earns trust from groups that could otherwise adopt a continually combative tone.[211] According to the ABA report, investors should possess a greater role in the process of selecting directors, gain enhanced access to corporate information that ensures effective shareholder monitoring, and participate more fully in discussions regarding business strategies.[212] Those mechanisms for enhanced

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[207] *See, e.g.*, Rodrigo Lozano, *Addressing Stakeholders and Better Contributing to Sustainability Through Game Theory*, 43 J. CORP. CITIZENSHIP 45, 45 (2011).

[208] *Id.*

[209] *See* Rock, *supra* note 20, at 892–902 (discussing strategies through which "a firm can transform investors into shareholders of the desirable type. The core intuition is Winston Churchill's: 'We shape our buildings, and afterwards our buildings shape us.'").

[210] Tina Chi, *Shareholder Activism: Boards Urged To Prep Response Teams in Light of Growing Shareholder Activism*, CORP. L. & ACCOUNTABILITY REP. (Apr. 24, 2009) (internal quotation marks omitted).

[211] Tina Chi, *Corporate Laws: ABA Business Law Section Urges Boards To Enhance Communications with Shareholders*, CORP. L. & ACCOUNTABILITY REP. (Jan. 29, 2010) (discussing the ABA report).

[212] *Id.*

discourse generate a reserve of good will that helps the corporation thrive even when crises erupt.[213]

Moreover, in her December 2013 speech at the Transatlantic Corporate Governance Dialogue, SEC Chair Mary Jo White touted the importance of effective managerial engagement of shareholders:

> Engagement with shareholders should mean more than just mailing out the annual proxy statement and conducting the annual meeting. It should mean proactive outreach, and clear, direct, and honest communications about how and why decisions are being made. Companies must work to inform their shareholders, to convey information about their governance policies and practices and to convince shareholders to vote, on the merits, for the company's nominees for director and for management's proposals. And the board of directors is—or ought to be—a central player in shareholder engagement.[214]

Noting that corporations now enter a "new era" of shareholder activism, she urged directors and corporate managers to find new ways to engage shareholders and the other stakeholders corporate policies affect.[215]

Other modes for effective stakeholder solicitation do not involve extensive managerial direction. Much study has been dedicated to promoting and monitoring "multiple-issue arenas" in which stakeholders of all stripes communicate in various dynamic contexts regarding corporate policies outside the corporation's control.[216] Those arenas remain quite protean and take place in any traditional or virtual media where public debates about corporate practices occur.[217] Although corporations can simply monitor the discourse, active participation in the dialogue provides a better chance that the corporation can attend to growing stakeholder concerns in a manner that produces positive results for all participants.[218] In essence, through dynamic engagement in a variety of communicative settings, corporations can stay ahead of the curve in managing market preferences.[219] Moving away from unidirectional communication from the corporation to the public, multiple-issue arenas entail

> a multidimensional perspective where dialogue, collaboration, and negotiation with multiple stakeholders occur simultaneously, while maintaining a zone of balance, an equilibrium that satisfies mutual interests. The role of PR [public relations] is thus to keep the virtues of "public discourse," as the debate could

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213 *Id.*

214 *See* White, *supra* note 1.

215 *Id.*

216 *See* Vilma Luoma-aho & Marita Vos, *Towards a More Dynamic Stakeholder Model: Acknowledging Multiple Issue Arenas*, 15 CORP. COMM. INT'L J. 315, 316–25 (2010) (discussing the growing literature around multiple-issue arenas in the corporate context).

217 *Id.* at 324.

218 *Id.* at 316–17, 322–23.

219 *Id.*

> be high jacked by extreme stakeholders, thereby hindering problem solving and collaboration by others.[220]

As new media develops within which stakeholders communicate, effectively attending to multiple issue arenas requires a multifaceted approach that involves both participation and monitoring to gain a competitive advantage.[221]

Assessing stakeholder salience constitutes an essential component to each of these solicitation strategies. Heeding every expressed viewpoint can cause costly distraction without producing gains for any party.[222] Based on social psychology studies, some organizational theorists emphasize the need to assess the degree to which different stakeholder groups can reward and punish companies regarding their CSR performance.[223] Groups that remain sufficiently organized, funded, embedded, and engaged over time provide the clearest examples of stakeholder interest groups whose views can affect financial performance.[224] Thus, even though stakeholder engagement across multiple fronts through dynamic modes of discourse can produce mutual gains, the discourse should not occur haphazardly.[225] Instead, effective modes of discourse should rely on empirical evidence obtained through organizational and social science investigations.

C. *Intermediary Involvement*

To assist corporations and shareholders in effective discourse, intermediary organizations can play an important role in filtering and processing stakeholder views. Perhaps based on a concern that shareholders and other stakeholders might lack the competence to sift through and interpret effectively the vast amounts of information necessary to make sound choices regarding corporate policy, some suggest that non-profit or quasi-governmental organizations with particularized interests could serve as effective expert liaisons between stakeholders and corporate managers.[226] Some profit-based entities, such as MSCI, provide expert analytical services both to corporations and investors

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[220] *Id.* at 322 (citations omitted).

[221] *Id.* at 324.

[222] *See* John Peloza & Lisa Papania, *The Missing Link Between Corporate Social Responsibility and Financial Performance: Stakeholder Salience and Identification*, 11 CORP. REPUTATION REV. 169, 170 (2008).

[223] *See generally id.* (surveying the social psychology literature in an attempt to discern when heeding stakeholder concerns leads to enhanced financial performance).

[224] *Id.* at 176–77.

[225] *See* Aditi Bagchi, *Who Should Talk? What Counts as Employee Voice and Who Stands To Gain*, 94 MARQ. L. REV. 869, 878–85 (2011) (discussing strategies for effectively taking into account salient employee concerns).

[226] *See, e.g.*, Laura Albareda, *Mapping the Novel Arrangements Adopted To Build the Corporate Responsibility Institutional Setting: A Contested Dynamic Interplay*, 40 J. CORP. CITIZENSHIP 75 (2010).

regarding CSR matters.[227] Using sophisticated information collection and monitoring techniques, MSCI helps investors make reasoned choices about company CSR practices in light of the existing regulatory regime that does not provide sufficient transparency or data intelligible to most CSR consumers and investors.[228] Non-profit entities play a similar role as well. For instance, NomoGaia Global Human Rights employs its own Human Rights Impact Assessment that the non-profit organization uses to assess various companies' human rights practices.[229] The reports are disseminated to the companies and made publicly available to foster discourse among the company and stakeholder groups to produce mutually beneficial changes in corporate practices regarding human rights issues.[230]

Beyond developing new metrics for collecting, filtering, and disseminating data relevant to stakeholders and investors, strategic partnerships between corporations and various interest groups can facilitate a mutually beneficial discourse.[231] For instance, cross-sector social partnerships (CSSP) represent cooperative efforts between firms and non-profit organizations that involve "integrated collaboration between firms with clear core competencies who are willing participants in a mutual exchange of value to invest in a long-term commitment to positive global change."[232] CSSPs that often involve joint ventures between business and stakeholder groups "can be an efficient way for businesses to evidence corporate values and social responsibility while pairing up with organizations that have the expertise to implement socially entrepreneurial programs. It also allows participating corporations access to markets that have previously untapped potential."[233]

Thus, to the extent corporations and shareholders lack the resources and competence to engage in direct discourse, intermediary organizations can play

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227 *See* MSCI, MSCI ESG RESEARCH 1 (2012), *available at* http://www.msci.com/resources/factsheets/MSCI_ESG_Research.pdf ("MSCI ESG Research provides in-depth research, ratings and analysis of the environmental, social and governance-related business practices of thousands of companies worldwide. Our products and services are used by institutional investors to integrate ESG factors into their investment processes. Our insights can help investors to uncover risks and opportunities that conventional investment research might not detect.").

228 *Id.*

229 NOMOGAIA, http://www.nomogaia.org (last visited Jan. 9, 2014). As described on NomoGaia's website, the organization is "a nonprofit research and policy organization dedicated to clarifying the corporate role in human rights protection and facilitating corporate responsibility for the communities impacted by capital projects." *Id.*

230 For an example of NomoGaia's Human Rights Impact Assessment involving Dole, see NOMOGAIA, DOLE HUMAN RIGHTS IMPACT ASSESSMENT (2010), *available at* http://nomogaia.org/2010/12/dole-fresh-fruit-hria-sample/ (download the zip file; then open 1_Costa_Rica_Dole_Fresh_Fresh_Fruit_HRIA.pdf).

231 *See* William Bradford, *Beyond Good and Evil: The Commensurability of Corporate Profits and Human Rights*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 141, 219–51 (2012) (using game theory concepts to assess the effectiveness of corporation–NGO partnerships).

232 Cotten & Lasprogata, *supra* note 48, at 10.

233 *Id.* at 21.

an essential diagnostic and facilitating function. Those intermediary entities, whether for profit or otherwise, serve as discourse therapists that strive to build a healthier relationship among all the parties affected by corporate policies and practices.

D. *Managerial Remodeling*

Although striving toward the same goal of promoting mutually beneficial gains for corporations and stakeholders, another strategy involves retooling internal decision-making structures to make better sense of the discourse already taking place. For example, one scholar suggests that corporate managers should employ formal game theory to help sift through the hodgepodge of stakeholder concerns.[234] Attention to formal organizational or political theory helps avoid showering excessive attention on certain shareholder groups that might not provide synergistic benefits to the corporation.[235]

Moving from a theoretical to a practical change, implementing new communicative technologies remains essential to facilitate transparency and accountability in a quickly evolving world.[236] One such project, dubbed "Accountability 2.0," rests on adopting multi-staged engagement across various communication platforms.[237] Based on empirical evidence culled from educational studies, the technologically enhanced discourse attempts to produce a "'blended engagement'—that is, a mix of Web-based and direct human interaction—to leverage the benefits of virtual environments with those of face-to-face contacts."[238] The sites of the discourse include public communication, customer relations management, advertising, marketing and brand maintenance, risk management, problem solving, and crisis mitigation all with a goal towards "real time, ongoing, interactive reporting, disclosure and dialogue around accountability."[239] Again, the key criterion with respect to each of these sites of discourse is transparency.[240] Citing some corporations, such as Timberland, as potential models for others to follow, the study notes that the future of robust accountability depends on interactive communication platforms that adapt to the ways in which actual consumers, investors, and stakeholders communicate with each other and corporations.

Although the preceding discussion of different modes of effective discourse does not attempt to provide a comprehensive survey of the vast social science literature surrounding stakeholder engagement, the methods examined provide

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[234] *See* Lozano, *supra* note 207; *see also* Bradford, *supra* note 231, at 220–51 (employing a game theory analysis of stakeholder partnerships).

[235] *See* Siebecker, *supra* note 203, at 564.

[236] Bill Baue & Marcy Murninghan, *The Accountability Web: Weaving Corporate Accountability and Interactive Technology*, 41 J. CORP. CITIZENSHIP 27, 36 (2011).

[237] *Id.*

[238] *Id.*

[239] *Id.* at 37.

[240] *Id.* at 28.

examples of how corporations might satisfy some of the new standards for implementing a new discourse theory of the firm. Again, the goal is not to attain perfection regarding the goals of discourse theory. The project remains much more pragmatic, with an eye towards making improvements that corporations, shareholders, and stakeholders would find workable. But falling short of realizing the ideal does not signal surrender. Instead, a new legal construct of the firm centered on discourse provides actual benefits precisely because it can be achieved through incremental changes in legal standards and business practices. Adopting a new discourse theory of the firm does not involve a charge to the barricades. Instead, discourse theory simply represents a more nuanced way of analyzing corporate law doctrine in a manner that pays greater descriptive fidelity to the actual ways in which corporations, shareholders, and other stakeholders interact in modern society. And with that greater descriptive clarity comes a normatively superior framework for addressing new corporate law problems that will arise as social institutions continue to evolve.

VI. IMPLICATIONS OF A NEW DISCOURSE THEORY OF THE FIRM

A new discourse theory of the firm will help solve the problems plaguing current corporate law doctrine identified at the outset of this Article. In particular, implementing new rules and incentives to promote robust discourse will provide significant insights regarding the role shareholders and other stakeholders should play in corporate governance, will help sustain the $32 trillion market for CSR,[241] and will restore a sense of legitimacy to the political processes that corporations increasingly dominate. Examining how a new discourse theory of the firm promotes corporate efficiency and political legitimacy should make the new corporate construct an easy sell. For if both are obtained, discourse theory provides mutual gains for businesses, the constituencies that corporations affect, and the polity at whose sufferance corporations exist.

A. *Efficiency*

Economic efficiency represents a fundamental advantage of a new discourse theory of the firm over existing corporate law doctrine. At first blush, this might seem odd considering the prevailing theory of the corporation that remains firmly predicated on shareholder wealth maximization.[242] But a theory of corporate organization based on continual discourse among corporate managers, consumers, investors, and other stakeholders will necessarily produce

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[241] PRINCIPLES FOR RESPONSIBLE INV., *supra* note 6, at 3.

[242] *See* Barbara Fried, *Is as Ought: The Case of Contracts*, 92 VA. L. REV. 1375, 1386–89 (2006) (discussing the tension between normative theories and efficiency); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1698 (1996) (positing the likely inefficiency in normative theory in regulating behavior).

a Pareto improvement over a stilted view of the corporation rooted in false assumptions about human rationality.[243]

But why would discourse theory necessarily promote efficiency if not centered on wealth maximization? A common fallacy in law and economics discourse provides the answer. Rather than focusing simply on wealth maximization, efficiency targets satisfaction of actual preferences, even those that do not carry a clear price tag.[244] As the burgeoning market for CSR demonstrates, consumers and investors possess interests regarding a variety of social, political, ethical, and environmental matters that do not reflect a blind dedication to short-term wealth maximization.[245] And as those preferences change, the role that the corporation plays in society evolves as well.

Thus, efficient rules for corporate organization should reflect what corporate managers, shareholders, consumers, and other stakeholders would hypothetically negotiate in a world of perfect information and without the burdens of any transaction costs in bargaining.[246] As the preferences of any parties change, the outcome of that hypothetical bargain would necessarily change. By definition, however, a static set of standards premised upon short-term wealth maximization cannot accommodate changing preferences. If preferences regarding the rules governing corporate behavior changed (perhaps regarding the role shareholders should play in corporate governance; the collection and dissemination of CSR data; or transparent disclosure of corporate political activities), strict adherence to static standards would undermine efficiency.[247] Instead of relying on a highly stylized and stilted view of the human condition as singularly focused on selfish wealth maximization, discourse theory adopts a much more behavioral economic approach.[248] A new

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[243] "Pareto Efficiency" represents a particular concept of efficiency articulated by Vilfredo Pareto. *See generally* VILFREDO PARETO, MANUAL OF POLITICAL ECONOMY (Ann S. Schweir & Alfred N. Page eds., Ann S. Schweir trans., 1971) (1906). According to Pareto, an efficient allocation of resources exists when no person could be made better off without making another individual worse off. *Id.* For a discussion of competing theories of efficiency, see Michael I. Swygert & Katherine Earle Yanes, *A Unified Theory of Justice: The Integration of Fairness into Efficiency*, 73 WASH. L. REV. 249, 267 n.80 (1998).

[244] *See* Williams, *supra* note 105, at 1657 (criticizing the "teaching of 'primitive' law and economics, which has taken the neoclassical economist's stylized picture of the person, *homo economicus*, a self-interested utility maximizer, and has assumed that this two-dimensional person occupies the real world, subjecting every aspect of life to a cost-benefit analysis, including decisions about law compliance").

[245] *See* Siebecker, *supra* note 47, at 162.

[246] *See* Lawrence A. Hamermesh, *Calling Off the* Lynch *Mob: The Corporate Director's Fiduciary Disclosure Duty*, 49 VAND. L. REV. 1087, 1152–54 (1996); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1201–03 (1999).

[247] *See* Siebecker, *supra* note 47, at 167.

[248] For a description of the distinction between a neoclassical approach to human rationality and a behavioral economic sensitivity, see Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663, 1667 (2003) ("The essential inaccuracy of the rational man model has minimized the capacity of

discourse theory of the firm requires engaging actual investors, consumers, and other stakeholders as they exist. By taking into account the interests of real, rather than pretend, parties to the negotiation, discourse theory enhances the likelihood of an efficient outcome regarding the rules governing corporate behavior.[249]

And even with respect to wealth maximization, a discourse theory of the firm provides incentives for corporations to seek competitive advantages that promote economic gains.[250] Although some disparage in blanket fashion any input by shareholders in corporate governance, a growing body of evidence suggests that proper consideration of various shareholder, consumer, and stakeholder concerns can produce significant opportunities for wealth creation.[251] Some adhere to overly simplistic solutions, such as shareholders selling their shares whenever dissatisfied with company practices. As Roger Lowenstein explains, however:

> To function well, organizations need the threat of exit, otherwise voice is powerless. But for the manifold decisions that do not rise to a level of all-out confrontation, "voice" is often more effective. A management aware of a real threat of shareholder voice would be more likely to consider implementing some of the shareholders' ideas without a battle. And for dissidents who were

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law and economics to generate useful insights in many areas of the law. Dissatisfaction with this state of affairs gave rise to a movement, variously called Behavioral Law and Economics (BLE), Behavioral Decision Theory (BDT), and Legal Decision Theory (LDT), that seeks to provide a more descriptively and predictively accurate account of human behavior; this is done by replacing the law and economics movement's stylized rational man model with a more accurate model based on empirical research arising from psychology, cognitive science, behavioral biology, decision theory, and related fields.").

[249] *See* Kysar, *supra* note 106, at 4–5 ("In recent years, however, a group of scholars has devoted considerable insight and energy to the project of behavioral law and economics. This emerging subdiscipline fuses traditional neoclassical economic analysis with lessons drawn from cognitive psychology and decision theory research. The result is a law and economics grounded in assumptions that comport better with observed real-world behavior than the stylized rational actor model featured in conventional law and economics.") (footnote omitted).

[250] *See infra* notes 251–53 and accompanying text.

[251] *See* White, *supra* note 1 ("I think most would agree that the advice on how to respond to shareholder engagement today is quite different from the advice companies were getting 30 years ago or even 10 years ago. The process has become less defensive and more proactive. We are seeing a concerted effort to persuade shareholders of the wisdom of management's choices and practices. That is a good thing. You also will consider whether this new era of activism is actually leading to better governance practices and to increases in shareholder value."). In addition, former SEC Chair Mary Schapiro linked the current economic meltdown to inattentiveness of boards to shareholder interests. *See* Press Release, SEC, SEC Votes To Propose Rule Amendments To Facilitate Rights of Shareholders To Nominate Directors (May 20, 2009) ("The nation and the markets are experiencing one of the most serious economic crises of the past century. This crisis has led many to question whether boards of directors are truly being held accountable for the decisions they make.").

> elected, inclusion in the boardroom, in most cases, would be a moderating experience. Dissidents shout; directors discuss.[252]

Thus, giving shareholders and other stakeholders greater voice provides positive opportunities for managers to govern the corporation more effectively.[253]

In the end, the reflexive attention to evolving market preferences provides the inextricable link between discourse and efficiency. Requiring ongoing reflective dialogue between the corporation and its constituencies in order to assess the legitimacy of corporate decisions helps corporate managers uncover opportunities for wealth creation and market advantages. As those preferences change, corporate decisions should rationally change to accommodate more effectively the constituencies that corporate managers serve. In contrast to static theories of the firm spurred by slavish attention to wealth maximization, a new discourse theory of the firm better promotes economic efficiency by providing incentives to calibrate continually corporate decision-making with the actual preferences of consumers, investors, and other stakeholders. As a result, all parties to the discourse enjoy mutual gains.

B. *Legitimacy*

Arguably more important than efficiency, a new discourse theory of the firm promotes a revitalized sense of legitimacy within the political realm.[254] The growing influence of corporations in virtually all aspects of economic, social, and political life already provides sufficient grounds for democratizing more fully internal corporate structures.[255] The decision in *Citizens United* pushes corporate law over the precipice and all but requires giving public constituencies greater voice in corporate deliberations.[256] For if corporations dominate public opinion and set the political agenda, not much remains in the traditional public sphere. Engendering robust senses of fairness, transparency, and participation within the corporate context remains necessary to protect a sense of participatory citizenship that secures our basic freedoms and popular sovereignty.

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[252] Lowenstein, *supra* note 63.

[253] For a detailed accounting of the role that voice and exit play in organizational design and effectiveness, see ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: REPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

[254] *See* FINLAYSON, *supra* note 76, at 112–13.

[255] *See generally* Colleen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347 (2006); Fairfax, *supra* note 63; Fairfax, *supra* note 89; Lee, *supra* note 64; Lucas E. Morel, Commentary, *The Separation of Ownership and Control in Modern Corporations: Shareholder Democracy or Shareholder Republic?*, 63 WASH. & LEE L. REV. 1593 (2006); Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503 (2006).

[256] Forbath, *supra* note 86, at 992.

A new discourse theory of the firm provides a rejuvenated sense of integrity in the political realm that preserves our democratic values. Built upon the notion that robust discourse enhances the effectiveness and justness of the organizational structures that affect our lives, a discourse theory of the firm requires crafting rules and incentives that promote independent expression of opinions, equal participation by affected parties in deliberative processes, respectful consideration of viewpoints, and the ability to alter past decisions through continued discourse.[257] Though certainly an aspirational set of criteria for ideal deliberation, the discourse principle represents a set of procedural mechanisms to promote just outcomes.[258]

Within the corporate setting itself, the proposed standards for enforcing effective corporate communication and the various modes of discourse that could satisfy those standards provide investors, consumers, and other stakeholders with a more meaningful sense of citizenship.[259] Although corporations do not constitute traditional polities, they increasingly take on the roles once completely within the bailiwick of government. Guiding the evolution of corporate doctrine and utilizing principles of political philosophy does not seem unwarranted or unwieldy. Quite to the contrary, as decisions affecting some of the most important aspects of our lives get made by conclaves of corporate executives, applying rules of justice to corporate law seems more appropriate than simple contract principles governing exchanges of goods and services. By providing greater participation of various constituencies in corporate decision-making,[260] enhanced disclosure of information relevant to consumer and investor preferences, and better mechanisms to insure transparency and accountability of corporate managers, a new discourse theory of the firm properly employs a blend of political and corporate theory to secure a basic sense of justice within corporate practices and policies.[261]

A revitalized sense of legitimacy also arises in the political realm as a result of a discourse theory of the firm. The corporation as an institution has become so important in political life that the integrity of its organizational structure significantly affects, if not controls, the confidence in our democratic processes. If special interests, managerial imperialism, or other antidemocratic values dominate corporations, we will realize a diminished sense of citizenship within our polity.[262] A discourse theory of the firm strives to stave any such corruption

[257] *See supra* notes 68–86 and accompanying text.

[258] *See supra* notes 68–86 and accompanying text.

[259] Forbath, *supra* note 86, at 992.

[260] HABERMAS, BETWEEN FACTS, *supra* note 68, at 165–70.

[261] Forbath, *supra* note 86, at 992 ("A constitutionally self-limiting state, a scheme of rights that ensures a politically autonomous citizenry and a network of vibrant, legally vouchsafed public spheres—together, these may enable the lifeworld and its communicative or intersubjective rationality to flourish and thereby secure the emancipatory hopes Weber abandoned and Marx mistakenly lodged in the economy.").

[262] *See* HABERMAS, BETWEEN FACTS, *supra* note 68, at 166–67 ("[N]on-neutralizable bargaining power should at least be disciplined by its equal distribution among the parties

by ensuring just and fair internal corporate structures. So even if corporations continue to increase their power and dominion in economic, social, and political life, we gain some sense that the institution of the corporation will not adulterate the faith in our political commitments. For if the corporation provides meaningful avenues for taking into account the views of those whose voices now lack much resonance in the political realm, our ability to participate in public discourse simply shifts venues. A discourse theory of the firm attempts to make sure those pathways for voicing effectively shareholder, consumer, and stakeholder concerns remain robust and secure. Thus, by transferring principles for just political organization onto the corporation, we can secure our democratic values despite increasing corporate control over the political sphere.

VII. CONCLUSION

This second installment in a series advancing a new discourse theory of the firm provides a set of robust political and organizational principles to guide the evolution of the business law in a manner that can cure the otherwise insurmountable ills infecting existing corporate theory and doctrine. As corporations increasingly dominate our economic, social, and political lives, and as shareholders vie for greater influence over business policies, solving those persistent problems remains of paramount import. Predicated upon an outmoded mantra of shareholder wealth maximization, however, current theories of the firm provide inadequate guidance regarding the proper role of shareholders and other stakeholders in corporate governance, place at risk the basic viability of the $32 trillion market for CSR, and undermine the integrity of our democratic commitments in the political realm. Because a fundamental failure to engage in effective discourse with the constituencies that corporations should ultimately serve lies at the core of each of these problems, a new discourse theory of the firm seems especially useful as a new organizing principle for corporate doctrine. Where adherence to static corporate law principles poses extraordinary risks, a new discourse theory of the firm would help solve the problems infecting current corporate law, promote greater efficiency in business decisions, and ensure a basic legitimacy within the political realm.

. . . [securing] all the interested parties with an equal opportunity for pressure . . . to influence one another in the actual bargaining, so that all the affected interests can come into play and have equal chances of prevailing."); *see also* Forbath, *supra* note 86, at 992.